Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

SISTERS OF THE HOLY FAMILY OF NAZARETH, A TEXAS CORPORATION,

Petitioner,

v.

CITY OF GRAND PRAIRIE,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents the question of whether a city can circumvent 42 U.S.C. 1983 and 42 U.S.C. 1988 by claiming that a state statute offers similar relief, even though it does not provide for the recovery of attorney's fees by a prevailing party.

This case also presents the question of whether Tex. Rev. Civ. Stat. Ann. art. 1105b § 9 (Vernon Supp. 1987) provides an adequate postdeprivation remedy for a landowner who successfully challenges the constitutionality of a lien which has been maintained by a municipality for almost four years.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Texas are those listed in the caption:

Petitioner:

Sisters of the Holy Family of Nazareth,
A Texas Corporation
1814 Egyptian Way
P.O. Box 530959
Grand Prairie, Texas 75053-0959

Respondent:

City of Grand Prairie, Texas
P.O. Box 530011
Grand Prairie, Texas 75053-0011

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No. _____

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SISTERS OF THE HOLY FAMILY OF NAZARETH, A TEXAS CORPORATION,

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CITY OF GRAND PRAIRIE,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to the Supreme Court of Texas which, on May 11, 1994, denied a Petition for writ of error to review the judgment and opinion that the Court of Appeals for the Fifth Judicial District of Texas at Dallas, Texas entered in this action on October 21, 1993.

OPINIONS BELOW

A final decision was reached, in an administrative hearing, by the City Council of Grand Prairie, on June 14,

1988. The 134th Judicial District Court of Dallas County, Texas reviewed the City Council's decision, and entered a final judgment in favor of Petitioner on April 27, 1992. (Tr.Ct.No. 88-08122-G) The Court of Appeals for the Fifth District of Texas at Dallas, Texas, affirmed the District Court's Judgment on July 27, 1993. (No. 05-92-01962-CV) This Judgment was vacated, and a final Judgment on Rehearing was entered by the Court of Appeals for the Fifth District at Texas on October 21, 1993, which partially affirmed, and partially reversed and rendered, the trial court's Judgment. This opinion is reported at 867 S.W.2d 835 (1993). The Texas Supreme Court denied Petitioner's Petition for Writ of Error on May 11, 1994. There was no published opinion denying this Petition.

BASIS FOR JURISDICTION

This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No Person shall . . . be deprived of life, liberty, or property, without due process of law . . .

United States Constitution, Amendment XIV:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law . . .

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988(b):

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Tex. Rev. Civ. Stat. Ann. art. 1105b § 9 (Vernon Supp. 1987):

Notice and hearing; contents of notice

Sec. 9. No assessment herein provided for shall be made against any abutting property or its owners, nor against any railway, street railway or interurban, or owner, until after notice and opportunity for hearing as herein provided, and no assessment shall be made against any

abutting property or owners thereof in excess of the special benefits of such property, and its owners in the enhanced value thereof by means of such improvements as determined at such hearing. Such notice shall be by advertisement inserted at least three (3) times in some newspaper published in the city where such special assessment tax is to be imposed, if there be such a paper; if not, then the nearest to such city of general circulation in the county in which such city is located; . . . If any such notice shall describe in general terms the nature of the improvements for which assessments are proposed to be levied and to which such notice relates, shall state the highway, highways, portion or portions thereof to be improved, shall state the estimated amount or amounts per front foot proposed to be assessed against the owner or owners of abutting property and such property on each highway or portion with reference to which hearing mentioned in the notice is to be held, and shall state the estimated total cost of the improvements on each such highway, portion or portions thereof, . . . Such hearing shall be by and before the governing body of such city and all owning any such abutting property, . . . shall have the right, at such hearing, to be heard on any matter as to which hearing is a constitutional prerequisite to the validity of any assessment authorized by this Act, and to contest the amounts of the proposed assessments, the lien and liability thereof, the special benefits to the abutting property and owners thereof by means of the improvements for which assessments are to be levied, the accuracy, sufficiency, regularity and validity of the proceedings and contract in connection with such improvements

and proposed assessments, and the governing body shall have power to correct any errors, inaccuracies, irregularities, and invalidities, and to supply any deficiencies, and to determine the amounts of assessments and all other matters necessary, and by ordinance to close such hearing and levy such assessments before, during or after the construction of such improvements, but no part of any assessment shall be made to mature prior to acceptance by the city of the improvements for which assessment is levied.

Anyone owning or claiming any property assessed, or any interest therein, . . . who shall desire to contest any such assessment on account of the amount thereof, or any inaccuracy, irregularity, invalidity, or insufficiency of the proceedings or contract with reference thereto, or with reference to such improvements, or on account of any matter or thing not in the discretion of the governing body, shall have the right to appeal therefrom and from such hearing by instituting suit for that purpose in any court having jurisdiction, within fifteen (15) days from the time such assessment is levied, and anyone who shall fail to institute such suit within such time shall be held to have waived every matter which might have been taken advantage of at such hearing, and shall be barred and estopped from in any manner contesting or questioning such assessment, the amount, accuracy, validity, regularity, and sufficiency thereof, and of the proceedings and contract with reference thereto and with reference to such improvement for or on account of any matter whatsoever. . . .

STATEMENT OF THE CASE

Petitioner, Sisters of the Holy Family of Nazareth, a Texas Corporation (hereinafter referred to as "Landowner") owns property that abuts Northwest 19th Street in the City of Grand Prairie, Dallas County, Texas. Respondent, City of Grand Prairie (hereinafter referred to as "City") levied a special assessment against this property which represents a portion of the cost of improving Northwest 19th Street. At the time of the assessment, Landowner's property was used for religious purposes as a convent, retirement home, retreat center, chapel, and cemetery complex.

Landowner filed the underlying lawsuit, pursuant to Article 1105b of the Texas Revised Civil Statutes, the Fifth Amendment of The United States Constitution, the Fourteenth Amendment of the United States Constitution, 42 U.S.C. 1981-87, (especially 42 U.S.C. § 1983), and 42 U.S.C. § 1988, contesting the special assessment as being imposed arbitrarily. The trial court found that the City acted arbitrarily in enacting the ordinance that imposed the assessment and lien, and declared that the assessment and lien were unconstitutional because they were without the support of substantial evidence that special benefits were conferred on the property. The trial court found that the City's actions supported a claim under 42 U.S.C. § 1983 and awarded reasonable attorney's fees under 42 U.S.C. § 1988. The Dallas Court of Appeals affirmed the portion of the trial court's judgment that declared that the assessment was not based on substantial evidence, and that the City's assessment ordinance was unconstitutional as a matter of law, and therefore invalid. The appellate court, however, declined to find that the City's actions

supported a claim under 42 U.S.C. § 1983 and reversed the trial court's award of reasonable attorney's fees under 42 U.S.C. § 1988. Landowner filed a petition for writ of error in the Supreme Court of Texas; on May 11, 1994, the Supreme Court of Texas denied Landowner's petition for writ of error.

The $37,270.00 assessment was imposed on June 14, 1988, and the trial occurred on April 21, 1992. The City conducted a very vigorous defense (including removal to federal court, which was later found to be improper, with the case being remanded to state court). The amount of reasonable and necessary attorney's fees and costs for representation of the Landowner, up until the time of the trial, was stipulated. At the end of the trial, the trial court took note of the hours and hourly rates of counsel, and found that reasonable attorney's fees, and costs (through the trial) were $63,768.00. There is no contention that the amount of attorney's fees was not reasonable and necessary.

Respondent has not challenged the Dallas Court of Appeals' Opinion on Rehearing, nor did it file a petition for writ of error in the Supreme Court of Texas.

REASONS FOR GRANTING THE WRIT

This case presents the question of whether a city can circumvent 42 U.S.C. § 1983 and 42 U.S.C. § 1988 by claiming that a state statute offers similar relief, even though it does not provide for the recovery of attorney's fees by a prevailing party.

This case also presents the question of whether Tex. Rev. Civ. Stat. Ann. art. 1105b § 9 (Vernon Supp. 1987) provides an adequate postdeprivation remedy for a landowner who successfully challenges the constitutionality

of a lien which has been maintained by a municipality for almost four years.

The Dallas Court of Appeals found that an assessment imposed on a basis other than special benefits conferred, or in an amount exceeding the special benefits, constitutes a taking without just compensation in violation of the United States Constitution. *City of Grand Prairie v. Sisters of the Holy Family of Nazareth*, 868 S.W.2d 835, 843 (Tex.App. – Dallas 1993), citing U.S. Const. amends. V, XIV; *Village of Norwood v. Baker*, 172 U.S. 269, 279, 19 S. Ct. 187, 190 (1898); *Haynes v. City of Abilene*, 659 S.W.2d 638, 641 (Tex. 1983); *City of Houston v. Blackbird*, 394 S.W.2d 159, 162 (Tex. 1965).

The Dallas Court of Appeals refused to recognize that this Constitutional violation supports a civil rights claim. The Dallas Court of Appeals reasoned that Tex. Rev. Civ. Stat. Ann. art. 1105b § 9 (Vernon Supp. 1987) provides for a suit to remove the lien as a function of the 1105b appellate process, and that such a suit constitutes an adequate remedy under Texas law, and thereby precludes a 42 U.S.C. § 1983 cause of action, and an award of attorney's fees, under 42 U.S.C. § 1988.

The Court of Appeals erred when it held that a suit under Tex. Rev. Civ. Stat. Ann. art. 1105b § 9 (Vernon Supp. 1987) provides an adequate remedy to vindicate the rights of a landowner who has had its constitutional rights violated. Concurrent with the illegal assessment, the City imposed a lien on Landowner's property. Before the imposition of the lien, Landowner had clear title to its property. It took almost four years of litigation for a

district court to hold that the City's actions were arbitrary. Throughout this entire time, the property was burdened with the unconstitutional lien (Stipulations 35, 36, 59; App. 33 and 41). Tex. Rev. Civ. Stat. Ann. art. 1105b § 9 (Vernon Supp. 1987) does not, by itself, provide any type of remedy for the deprivation during this time; nor does it provide for the recovery of attorney's fees by a successful landowner.

The Dallas Court of Appeals relied heavily on *McKesson v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 110 S. Ct. 2238 (1990) for the proposition that if a municipality offers a *meaningful* (emphasis added) opportunity for taxpayers to withhold contested tax assessments and challenge their validity, no deprivation of property without due process of law has occurred.

McKesson considered the question of "whether prospective relief, by itself, exhausts the requirements of federal law." The Supreme Court of the United States plainly held: "The answer is no: if a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post-payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *McKesson,* 496 U.S. at 18.

It is disingenuous to say that this Landowner was given the opportunity to withhold the contested assessment during the litigation period. Although the City took no money from the Landholder during this time, the City did take away the right to clear title to the property, by the imposition of the unconstitutional lien. In addition,

the City actively pursued its efforts to collect the assessment by sending monthly statements to Landholder from January 1990 through the month of the trial. The City also hired a law firm to send a demand letter, by certified mail, threatening a foreclosure suit, and suggesting that the Landowner remit payment immediately to the City of Grand Prairie (Stipulation 57; App. 40). Landowner was not afforded a *meaningful opportunity* to contest the tax assessment without having the unconstitutional lien attach to its property.

The precedential effect of the Dallas Court of Appeals' Opinion (disallowing reasonable attorney's fees) is that in order to "afford" the "opportunity" for due process, a landowner must be prepared to have an unconstitutional lien imposed on its property during lengthy litigation, and must also be able to pay reasonable attorney's fees in an amount that could be well in excess of the illegal assessment. This system does not offer a "meaningful opportunity" to contest an assessment, and does not satisfy the due process requirements of the Fifth and Fourteenth Amendments. Without the intervention of the Supreme Court of the United States, the Appellate Court's Opinion effectively negates a landowner's ability to have an illegal assessment ordinance declared null and void, remove the cloud on its title to the property, and otherwise enforce a landowner's constitutional rights.

In *Parratt v. Taylor,* 451 U.S. 527 (1981), the U.S. Supreme Court held that an inmate of a state prison, whose mail order hobby materials were lost when normal procedure for receipt of mail packages was not followed, did not have a 42 U.S.C. § 1983 cause of action against

prison officials to recover the value of such hobby materials. The Court, in a plurality opinion written by Justice Rehnquist, took the position that 42 U.S.C. § 1983 should not be used for every tort which is committed by a governmental official, and would not be proper if a state offered an adequate postdeprivation remedy. The plurality opinion pointed out that the State of Nebraska had statutes that provided a procedure for the state to hear and pay claims of prisoners housed in its penal institutions. The Court found that:

> [t]he remedies provided could have fully compensated the respondent for the property loss he suffered,

and were as such sufficient to satisfy the requirements of due process. *See id.* at 544. In a concurring opinion, Justice Stewart wrote:

> To hold that this kind of loss [hobby materials valued at $23.50] is a deprivation of property within the meaning of the Fourteenth Amendment seems not only to trivialize, but grossly distort the meaning and intent of the Constitution.

See id. at 545.

In another concurring opinion, Justice Blackmun stated:

> I continue to believe that there are certain governmental actions that, even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of due process. . . . Most importantly, I do not understand the Court to suggest that the provision of 'postdeprivation remedies,' . . . within a state system would cure the unconstitutional nature of a state official's intentional act that deprives a person of property.

Id. at 545.

In yet another concurring opinion, Justice Powell wrote:

> [u]nlike the Court, I do not believe that such negligent acts by state officials constitute a deprivation of property within the meaning of the Fourteenth Amendment, regardless of whatever subsequent procedure a State may or may not provide.

Id. at 546.

Finally, Justice Marshall, concurring in part and dissenting in part, wrote:

> I part company with the majority, however, over its conclusion that there was an adequate state-law remedy available to respondent in this case.

Id. at 555.

As recently as last term, the members of the Supreme Court of the United States have not been able to agree about the application of *Parratt v. Taylor.* In *Albright v. Oliver,* 62 USLW 4078 (1994), Justice Kennedy (joined by Justice Thomas), wrote in a concurrence about the "clarity of the *Parratt* rule: In the ordinary case where an injury has been caused not by a state law, policy, or procedure, but by a random and unauthorized act that can be remedied by state law, there is no basis for intervention under § 1983, at least in a suit based on 'the Due Process Clause of the Fourteenth Amendment simpliciter.' " In the same case, Justice Stevens (joined by Justice Blackmun) wrote in a dissent that "The *Parratt* doctrine is reconcilable with § 1983 only when its application is limited to situations in which no constitutional violation occurs. In the context of certain deprivations of property, due process is afforded – and therefore the Constitution

is not violated – if an adequate postdeprivation state remedy is available in practice to provide either the property's prompt return or an equivalent compensation."

The instant case offers The Supreme Court of the United States an excellent opportunity to clarify what it means by a *meaningful opportunity* to contest taxes, and also give some guidelines regarding the *adequacy* of postdeprivation state remedies. The Court should shed light on when a civil rights action is not appropriate under federal law; what constitutes an *adequate remedy* under state law; and whether relief under state law, that comes only after years of expensive litigation (and without the possibility for the recovery of reasonable attorney's fees) can be considered to be "adequate."

The facts of this case are similar to those in *City of Arlington v. Byrd*, 713 S.W.2d 224 (Tex. App. – Fort Worth 1986, writ ref'd n.r.e.), *cert denied*, 482 U.S. 929 (1987). In both cases, a city enacted an ordinance that attempted to impose paving assessments in amounts which were based upon a benefit to accrue to property owners in the indefinite future. Both the Court of Appeals of Dallas (in the instant case), and the Court of Appeals of Fort Worth (in the *Byrd* case), found that paving assessments, which are based upon something other than substantial evidence of a special benefit accruing to property within the immediate future, are unconstitutional.

In *Byrd* the Fort Worth Court of Appeals held that the City of Arlington's actions constituted a violation of 42 U.S.C. §§ 1981-87, and allowed attorney's fees under 42

U.S.C. § 1988. That court further held that "[m]unicipalites are 'persons' within the meaning of the statute, . . . and may be held liable for damages for constitutional violations flowing from their legislative activities, even in the absence of bad faith." *See id.* at 228.

In footnote 3 of the Opinion on Rehearing, the Dallas Court of Appeals attempted to distinguish the *Byrd* case by stating that, "[i]n *Byrd*, appellants, claiming that a city is not a proper defendant in a section 1983 cause of action, did not contest the trial court's conclusion of law that the assessment liens amounted to an interference with title to property and constituted a taking without just compensation." The cases should not be distinguished in this manner, as the City of Grand Prairie is estopped from contesting that the assessment liens amounted to an interference with title to the Landowner's property. Prior to trial, the City stipulated that, "the paving assessments constitute a statutory lien (interference) with Plaintiff's title to the property" (Stipulation 35; App. 33). The Dallas Court of Appeals ignored this stipulation in its attempt to distinguish the *Byrd* case.

In the Opinion on Rehearing, the Dallas Court of Appeals recognized that a Section 1983 cause of action is appropriate in a special assessment case [in an article 1105b appeals hearing] if a plaintiff/landowner establishes that the City Council hearings, coupled with a judicial review (applying the substantial evidence rule) is not adequate to preserve the Landowner's right to just compensation and due process of law. The Court erred, however, in holding that the facts of this case did not support a section 1983 cause of action. The pre-assessment hearing (before the city council) did not provide

just compensation. A judicial review pursuant to article 1105b (but not coupled with a § 1983 cause of action) would not provide just compensation – this statute does not provide for the recovery of attorney's fees by a successful plaintiff/landowner.

THE HEARING BEFORE THE CITY COUNCIL

The hearing before the city council certainly did not provide Landowner with just compensation, or due process of law. In particular, the City reached a final decision concerning the assessments, imposed a lien on the property which encumbered title to it and which would continue until the City chose to release it, or until a final judgment would be entered decreeing that the lien is invalid. There was nothing more for the Sisters of the Holy Family of Nazareth to do at the City Council level.

Part of the hearing before the City Council took place in a closed door session, with the City Attorney advising the Council that it could not change the assessment on the property. This was erroneous advice, as Tex. Rev. Civ. Stat. Ann. art. 1105b § 9 (Vernon Supp. 1987) states in part: " . . . the governing body shall have the power to correct any errors, inaccuracies, irregularities and invalidities, and to supply any deficiencies and to determine the amounts of assessments and all other matters necessary . . . ". The pre-assessment hearing did not afford Landowner a meaningful opportunity to be heard for the purpose of providing the City Council with a reason for correcting errors which may have been contained in the "enhancement study". Although the trial court did not award specific damages for these actions, it

did take them into consideration in finding a denial of due process. *Grace v. Structural Pest Control Board of Texas,* 620 S.W.2d 157, 160 (Tex. Civ. App. – Waco 1981, writ ref'd n.r.e.), discussed administrative hearings in general, and held that "[i]n addition to substantial evidence to support the action of an administrative agency, the proceedings of the agency must meet the requirements of due process of law and the rudiments of fair play, in order to be upheld . . . the hearing must not be arbitrary, and must not be inherently unfair."

THE JUDICIAL REVIEW

Pursuant to Tex. Rev. Civ. Stat. Ann. art. 1105b (Vernon Supp. 1987), in order to invalidate an unconstitutional special assessment, a landowner must file a lawsuit. This lawsuit is a review of the city council's actions, not a step in the city's determination of whether it should impose an assessment. A court cannot substitute its judgment for that of the City Council. The court can only review the propriety of the council's actions. In this type of lawsuit, the citizen has an extremely heavy burden to overcome in proving that the City Council's assessment was arbitrary. As the Supreme Court of Texas pointed out in *Haynes,* 659 S.W.2d at 640, there is a strong presumption in favor of validity of a municipal ordinance and review of an ordinance by the court is governed by the substantial evidence rule. Substantial evidence need not be much evidence, but substantial evidence means more than a scintilla.

Tex. Rev. Civ. Stat. Ann. art. 1105b (Vernon Supp. 1987) does not provide any remedy to a successful landowner, other than the eventual restoration of clear title to the property.

CASES CITED BY THE DALLAS COURT OF APPEALS DISTINGUISHED FROM CASE AT BAR

In its Opinion on Rehearing for the instant case, *Grand Prairie v. Sisters of Holy Family of Nazareth, a Texas Corporation*, 868 S.W.2d 835, 843 (Tex. App. – Dallas 1993), the Dallas Court of Appeals misconstrued the holdings in several cases. The Court cited *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 192, 194 n.13 (1985) and *Federal Deposit Ins. Corp. v. City of New Iberia*, 921 F.2d 610, 615 (5th Cir. 1991) for the proposition that "a specialized assessment, not based on special benefits, does not *automatically* entitle a plaintiff-taxpayer to an award of damages and attorney's fees under a Section 1983 cause of action, alleging a violation of the Fifth and Fourteenth Amendments." That is not the holding in either case.

In *Williamson*, the Supreme Court of the United States examined the ripeness doctrine, and reaffirmed its position that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulation to the property at issue." *Williamson*, 473 U.S. at 186. In examining the issue of ripeness for judicial review, the Court found that the respondent had not yet obtained a final decision

[from the planning commission] regarding how it would be allowed to develop its property. *Id.* at 190.

In the instant case, ripeness is not an issue. Prior to trial, the parties stipulated that; "everything necessary to be done by the City for a statutory lien to attach has been done." (Stipulation 59; App. 41); "The paving assessments constitute a statutory lien (interference) with Plaintiff's title to the property" (Stipulation 35; App. 33); and that "[s]uch lien will continue until the City of Grand Prairie releases it, or until a final judgment by this Court [i.e. the district court] is entered, decreeing that the lien of the City is invalid" (Stipulation 36; App. 33). Landowner had completed the process with the governmental entity (the City Council) which resulted in the imposition of an unconstitutional lien on its property.

Federal Deposit Ins. Corp. v. City of New Iberia, 921 F.2d 610 (5th Cir. 1991) was a case in which a landowner requested the city to construct a road which would specially benefit the landowner's property. The landowner subsequently defaulted, and the FDIC (as successor mortgagee) became the owner. Mortgagee did not have notice of the special assessment hearings, and challenged the constitutionality of the hearings on that basis (not on the basis that there was no special benefit to the property). In *City of New Iberia* at 616, the Fifth Circuit held that the Fourteenth Amendment comprehends a challenge to a special tax assessment only if it is so palpably punitive or *arbitrary as to confer no benefit on the landowner,* (emphasis added) or forces a landowner to make an improvement that while valuable to others, is useless to him. (Citing *Furey v. City of Sacramento,* 780 F.2d 1448, 1445.) *City of*

New Iberia found that there was no constitutional violation due to the facts of that case (mortgagee who did not have notice of the assessment hearing), and did not address the issue of attorney's fees.

The case at bar can be distinguished from *City of New Iberia* in that the challenge to the special assessment *was* on the basis of the assessment being arbitrary. In the instant case, both the trial and appellate courts agree that the special assessment was arbitrary and conferred no benefit on the Landowner. No evidence was presented to the council, nor to the trial court, that would indicate any special benefit conferred on the Landowner. In fact, as the Appellate Court pointed out in its Opinion on Rehearing, "the only testimony regarding the assessments as they relate to Sisters' property negates the validity of the assessment ordinance." *City of Grand Prairie v. Sisters of the Holy Family of Nazareth*, 868 S.W.2d 835, 840 (Tex.App. – Dallas 1993).

The Appellate Court cited *Mennonite Bd. of Missions v. Adams*, 463 U.S. 791 (1983), and *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, 313-14 (1950) for the proposition that "the date on which a taking or deprivation of property must be measured is the date on which governmental action "immediately and drastically diminishes the value of the [property owner's] interest." These cases are concerned with the question of when notice by publication is proper, and do not discuss the issue of whether or not a lien imposed upon a landowner's property by a governmental entity constitutes a taking or deprivation of property.

CONSTITUTIONAL CLAIMS UNDER 42 U.S.C. §§ 1983 AND 1988

42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The City's ordinance, (which imposed the assessment arbitrarily – without the support of substantial evidence that special benefits were conferred on the property), deprived Landowner of the right to clear title to the property. A lien is a property interest with a value. *Armstrong v. United States,* 364 U.S. 40 (1960). The stipulations state that the paving assessments constitute a statutory lien (interference) with [Landowner's] title to the property, and that such lien will continue until the City of Grand Prairie releases it, or until a final judgment invalidates the lien. (Stipulations 5, 14, 35 and 36; App. 30, 31

and 33. A reasonable inference would be that the "diminution of economic value" would be equal to the amount of the lien. Sisters of the Holy Family of Nazareth had to bring a suit in equity for proper redress to vindicate the constitutional deprivation of its rights.

Although Landowner did not seek monetary damages under 42 U.S.C. § 1983, it sought the removal of the lien, and the invalidation of the unconstitutional assessment ordinance. Landowner also asked for attorney's fees under section 42 U.S.C. § 1988. The scope of 42 U.S.C. § 1983 is broad, and includes "suits in equity, or other proper proceedings for redress." 42 U.S.C. § 1983 is not limited to suits for monetary damages.

In *Blanchard v. Bergeron*, 489 U.S. 87, 95-96 (1989), the Supreme Court stated:

> It is clear that Congress intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation . . . and not be reduced *because the rights involved may be non-pecuniary in nature*. . . . Section 1988 makes no distinction between actions for damages and suits for equitable relief. Congress has elected to encourage meritorious civil rights claims because of the benefits of such litigation for the named plaintiff and for society at large, irrespective of whether the action seeks monetary damages. (emphasis added)

42 U.S.C. § 1988(b) states:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

In denying attorney's fees to Landowner, the Dallas Court of Appeals took a very narrow view of civil rights litigation. "The statutory awarding of attorney's fees should be accorded broad interpretation since the statute is remedial in nature. . . . The basis for allowing such broad interpretations is to facilitate private enforcement and to allow the attorney to explore and develop every aspect of a case." *Williams v. City of Fairburn, Georgia*, 702 F.2d 973, 976 (11th Cir. 1983).

As the power and authority of municipal governments over citizens grows, so does the temptation to treat them unfairly. "Arbitrary, capricious, and unreasonable" are words that describe such conduct, and "deprivation of constitutional rights" is a phrase that is used. 42 U.S.C. § 1983 et seq. were enacted to give citizens the opportunity to correct governmental misconduct. Attorney's fees, provided by Section 1988 (in particular) are necessary to breathe life into the patriotic words of Section 1983. Many constitutional violations would go unchallenged if the victims had to pay reasonable attorney's fees in order to gain redress.

This Court discussed the nature of attorney's fees in civil rights cases in *City of Riverside v. Rivera*, 477 U.S. 561 (1986). This Court recognized that the nature of civil rights violations "frequently involve substantial expenditures of time and effort but produce only small monetary recoveries." *Riverside*, 477 U.S. at 577. This Court held that it would be improper to limit the amount of the fee recovered to a proportionate amount of a monetary recovery:

> A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose in enacting § 1988. Congress recognized that private-sector fee arrangements were inadequate to ensure sufficiently vigorous enforcement of civil rights. In order to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case. *Riverside*, 477 U.S. at 578.

CONCLUSION AND PRAYER FOR RELIEF

Petitioner, Sisters of the Holy Family of Nazareth, a Texas Corporation, respectfully prays that this Court: grant this application for writ of certiorari, reverse the holding of the Appellate Court insofar as it does not allow Petitioner to recover its attorney's fees, affirm the decision of the trial court below, remand the case so that the trial court may award additional attorney's fees for

presenting this case to this Court, and grant such other and further relief to which Petitioner may be entitled.

Respectfully submitted,

Counsel for Petitioner

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APPENDIX
THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

May 11, 1994

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RE: Case No. 94-0104

Style: SISTERS OF THE HOLY FAMILY OF NAZARETH, A TEXAS CORPORATION v. CITY OF GRAND PRAIRIE

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ or error with the notation "Writ Denied".

Sincerely,

John T. Adams, Clerk
by /s/ Gene Burns
Gene Burns, Deputy

IN THE SUPREME COURT OF TEXAS

NO. 94-0104	
SISTERS OF THE HOLY FAMILY OF NAZARETH, A TEXAS CORPORATION	From DALLAS County, 5th District. 05-92-01962-CV
v.	(Filed July 11, 1994)
CITY OF GRAND PRAIRIE	

Application of petitioner for writ of error to the Court of Appeals for the Fifth District having been duly considered, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied.

It is further ordered that applicant, Sisters of the Holy Family Of Nazareth, a Texas Corporation, pay all costs incurred on this application.

* * *

I, **JOHN T. ADAMS,** Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the date shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 13th day of June, 1994.

John T. Adams, Clerk

by /s/ Gene Burns
Courtland Crocker
Deputy

(SEAL)

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CITY OF GRAND PRAIRIE, Appellant No. 05-92-01962-CV V. SISTERS OF THE HOLY FAMILY OF NAZARETH, A TEXAS CORPORATION, Appellee	Appeal from the 134th Judicial District Court of Dallas County, Texas. (Tr.Ct.No. 88-08122-G). Opinion delivered by Justice Rosenberg, Justices Kinkeade and Maloney participating.

This Court's judgment of July 27, 1993 is VACATED. The following is now our judgment.

In accordance with this Court's opinion of this date, we AFFIRM that part of the trial court's judgment that renders the City of Grand Prairie's Ordinances Nos. 4348, 4362, and 4620 null and void, without force or effect, in so far as they apply to Sisters of The Holy Family of Nazareth, a Texas Corporation.

We REVERSE that part of the trial court's judgment that awards attorney's fees to Sisters of The Holy Family of Nazareth, a Texas Corporation, and RENDER that Sisters of the Holy Family of Nazareth, a Texas Corporation, take nothing on its claim for attorney's fees.

We AFFIRM the trial court's judgment in all other respects.

It is ORDERED that appellant, City of Grand Prairie, and appellee, Sisters of the Holy Family of Nazareth, a Texas Corporation, each bear its own costs of this appeal.

Judgment entered October 21, 1993.

/s/ Barbara E. Rosenberg
BARBARA E. ROSENBERG
JUSTICE

CITY OF GRAND PRAIRIE, Appellant,

v.

SISTERS OF the HOLY FAMILY OF NAZARETH, A Texas Corporation, Appellee.

No. 05-92-01962-CV.

Court of Appeals of Texas, Dallas.

Oct. 21, 1993.

Rehearing Denied Dec. 28, 1993.

Taxpayer brought suit against city contending that city's ordinance levying assessments on taxpayer's property was void. The 134th District Court, Dallas County, Anne Packer, J., invalidated assessment ordinance and awarded taxpayer attorneys fees for city's violation of taxpayer's federal constitutional rights. City appealed. The Court of Appeals, Rosenberg, J., held that: (1) city's assessment ordinance was invalid because taxpayer's property would not be benefitted in amount equal to or greater than amount of assessment; (2) taxpayer did not suffer constitutional injury compensable under § 1983 in absence of showing unconstitutional taking; and (3) taxpayer was not entitled to recover attorney fees under Texas law or under § 1988.

Affirmed in part, reversed and remanded in part.

R. Clayton Hutchins, Grand Prairie, Alan Wright, Margaret M. McLeod, Dallas, for appellant.

Charles J. Winns Rates Jr., Dallas, for appellee.

Before KINKEADE, MALONEY and ROSENBERG, JJ.

OPINION ON REHEARING

ROSENBERG, Justice.

We grant City of Grand Prairie's motion for rehearing. We withdraw our opinion of July 27, 1993 and vacate the judgment of that date. The following is now the Court's opinion.

Sisters of the Holy Family of Nazareth (Sisters) brought suit against the City of Grand Prairie (City) contending that the City's ordinance[1] levying assessments on Sisters's property was void. The trial court invalidated the assessment ordinance and awarded Sisters its attorney's fees for the City's violation of Sisters's federal constitutional rights. In thirteen points of error, the City complains generally that the trial court erred in entering judgment for Sisters because (1) the City's assessment ordinance was supported by substantial evidence of special benefits, and (2) the City's public hearings were held in compliance with all constitutional and statutory requirements.

We conclude that the City's assessment ordinance was not supported by substantial evidence. Consequently, the trial court did not err in rendering the assessment ordinance null and void. The trial court erred, however, in awarding attorney's fees based on a finding of federal constitutional violations by the City. Accordingly, we reverse the trial court's award of attorney's fees

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[1] References to the City's assessment ordinance refers to the City of Grand Prairie's Ordinances Nos. 4348, 4362, and 4620, which order the paving improvements and assess special taxes against Sisters and its property.

and render that Sisters take nothing on its claim for attorney's fees. We affirm the trial court's judgment in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

Sisters is a religious organization that owns property abutting Northwest 19th Street in Grand Prairie, Texas. The organization uses this property as a convent, retirement home, retreat center, chapel, and cemetery complex. In 1988, the City voted to levy assessments to cover a portion of the cost of improving Northwest 19th Street. The City hired an appraisal expert to conduct an enhancement study. The purpose of the enhancement study was to determine the value of benefits that would accrue to the twenty-five abutting property owners and the amount of money the City should assess against each owner.

The Grand Prairie City Council (City Council) held a public hearing on the proposed assessments. Sisters attended the hearing and announced that the proposed street improvements would not enhance its property because the property did not have direct access to Northwest 19th Street and the increased traffic flow would be detrimental to the property's current uses. The City Council postponed action on the matter until its staff could research the questions raised about the proposed assessments.

The City considered the matter again at the public hearing the next week. Sisters restated its opposition to the assessment. Following Sisters's objections, the council

members convened in a closed-door executive session to consult with the city attorney. Immediately upon the council members' return, the City Council voted to levy the assessments in Ordinance 4362. Sisters made a final objection asserting that the amount of the proposed assessment against its property was unreasonable and arbitrary. Sisters argued that the proposed street improvements would not confer special benefits on its property in an amount equal to the assessment. The council members responded that after consulting with the city attorney, the City Council found the appraisals to be fair and valid. Sisters was assessed $37,270 while many adjacent property owners were not assessed at all.

Sisters brought suit against the City and filed a motion for partial summary judgment. The trial court granted Sisters's motion stating "there was no substantial evidence that the subject property received a special benefit equal to, or in excess of the amount assessed." At the trial on the remaining issues, the City asked the trial court to reconsider its earlier ruling on Sisters's motion for partial summary judgment. Sisters did not object to the City's request, and the trial court agreed to reconsider its earlier ruling.

After reviewing the evidence and hearing the arguments of both parties, the trial court entered judgment in favor of Sisters. In support of its judgment, the trial court made findings of fact that there was no evidence of special benefits accruing to Sister's property in an amount equal to or in excess of the assessment. The trial court concluded that the City acted arbitrarily in levying the assessment. The trial court further concluded that the assessment constituted an interference with Sister's title

to the property and violated Sister's constitutional rights. The trial court further concluded that the City's actions constituted violations of the Fifth Amendment, the Fourteenth Amendment, and sections 1981-1988 of Title 42 of the United States Code. Finding federal constitutional violations, the trial court awarded $63,768 in attorney's fees to Sisters as a party who prevailed in a constitutional claim under section 1983.

VALIDITY OF THE ASSESSMENT ORDINANCE

In its third point of error, the City contends that the trial court erred in entering judgment for Sisters because the assessment ordinance was supported by substantial evidence of a special benefit.

Article 1105b of the Texas Revised Civil Statutes controls the City's ability to impose paving assessments on its citizens. *See* TEX.REV.CIV.STAT.ANN. art. 1105b (Vernon Supp.1993). Section 9 of this article prohibits the City from assessing property owners in an amount in excess of the special benefits conferred on their property by the paving improvements. *See* TEX.REV.CIV.STAT.ANN. art. 1105b (Vernon Supp.1993); *Haynes v. City of Abilene*, 659 S.W.2d 638, 641 (Tex.1983).

There is a strong presumption in favor of the validity of the City's legislative action. The burden of proof is on the party seeking to invalidate it. *Haynes*, 659 S.W.2d at 640. This Court has no authority to invalidate the City's ordinance unless the assessment is arbitrary or the result of fraud. *City of Houston v. Blackbird*, 394 S.W.2d 159, 163 (Tex.1965); *Cook v. City of Addison*, 656 S.W.2d 650, 658

(Tex.App. – Dallas 1983, writ ref'd n.r.e.). This inquiry presents a question of law for the Court. *Blackbird*, 394 S.W.2d at 163.

The substantial evidence rule governs our review of whether the City acted arbitrarily or fraudulently. *Haynes*, 659 S.W.2d at 640. We must affirm the action of the City Council if the assessment is supported by substantial evidence of a special benefit. *Id.* at 640-41. The Texas Supreme Court has defined a special benefit as an enhancement more localized in nature than the general improvement received throughout the community, but not necessarily unique to a given piece of property. *Id.* at 641-42. There is no presumption of a special benefit that arises simply by virtue of the improvement of a city street. *Id.* at 642. In some instances, street improvements may actually decrease the value of residential property. *Id.*

At trial, Sisters argued that the City's assessment ordinance was invalid because it was not supported by substantial evidence showing that its property would be benefitted in an amount equal to or greater than the amount of the assessment. Sisters introduced into evidence the minutes from the City Council's public hearings. The minutes reveal that no testimony was given in support of the assessment ordinance. In fact, the only testimony regarding the assessments as they relate to Sisters's property negates the validity of the assessment ordinance.

Sisters also introduced into evidence the documents reviewed by the City Council in making its decision to adopt the assessment ordinance. These documents show

that each council member received the proposed assessment ordinances and an assessment roll prepared in reliance of the City's enhancement study. The council members did not receive a copy of the enhancement study itself. The City relies exclusively upon the information contained in the enhancement study to supply the substantial evidence supporting the City Council's decision.

The enhancement study showed that the twenty-five abutting properties were individually analyzed using a land-only basis for determining enhancement value. No attempt was made to value the improvements on the land. The study concluded that the special benefits derived by Sister's property, as well as by nine of the other abutting properties, included a widened and paved street, newly constructed curbs and gutters, divided median strips, underground storm drainage, driveway approaches, and improved ingress, egress, and overall access. Without explanation, the study indicated that the other fifteen abutting properties did not receive any benefits from the street improvements.

James Wesley Cullar, the City's expert appraiser, testified at trial that his firm evaluated Sisters's property on a land-only basis without taking into consideration any improvements on the property. Using this method of valuation, Cullar explained that if Sister's property was vacant, its highest and best use would be the eventual subdivision into single-family residential housing. Cullar determined that as residential realty, Sisters's property would receive the benefits of improved drainage, better access, and increased traffic flow. In other words, the

benefit to Sisters's land was based on future development. Cullar was unable to state when, if ever, residential development would occur on Sisters's property.

We determine that a close examination of the enhancement study demonstrates that the City used a method of evaluating Sisters's property that was too remote in time and too speculative to warrant consideration in determining the enhancement values attributable to the street improvements. *See City of Austin v. Cannizzo,* 153 Tex. 324, 267 S.W.2d 808, 814 (1954) (asserting that to admit evidence of the value of land based on a use other than its present use, a party must show that the other use is reasonably probable within the immediate future or within a reasonable time); *see also Page v. City of Lockhart,* 397 S.W.2d 113, 119-20 (Tex.Civ.App. – Austin 1965, no writ) (applying reasoning in *Cannizzo* to determine admissibility of evidence of land values in assessment case). Speculation about special benefits that will accrue in the indefinite future does not constitute substantial evidence to support an assessment ordinance. *City of Arlington v. Byrd,* 713 S.W.2d 224, 228 (Tex.App. – Fort Worth 1986, writ ref'd n.r.e.), *cert. denied,* 482 U.S. 929, 107 S.Ct. 3213, 96 L.Ed.2d 700 (1987).

After considering the study as a whole, as well as the other evidence in the record, we conclude that the record does not contain substantial evidence to reasonably sustain the City Council's finding that the street improvements would enhance the value of Sisters's property in a sum equal to the amount assessed. Therefore, the trial court did not err in invalidating the City's assessment ordinance. We overrule the City's third point of error.

In its first two points of error, the City contends that the trial court improperly placed the burden of proving the assessment ordinance's validity on the City. The City argues that because the trial court required the City to present evidence supporting the assessment, Sisters was erroneously relieved of its burden of proof.

It is undisputed that Sisters had the burden of proving that the City Council's assessment was arbitrary. *See Haynes*, 659 S.W.2d at 640. The trial court acknowledged Sisters's burden by stating in its conclusions of law: "There is a strong presumption in favor of validity of a municipal ordinance and review of an ordinance by the court is governed by the substantial evidence rule. Substantial evidence need not be much evidence, but substantial evidence means more than a scintilla."

At trial, Sisters introduced into evidence the parties' stipulated facts, the minutes from the public hearings, the documents received by the council members, and the testimony of the City's expert appraiser. Sisters asserted that these documents did not contain substantial evidence of a special benefit. After Sisters established its prima facie case, the City tendered the enhancement study to refute Sisters's contentions. The City did not produce further evidence of the existence of a special benefit. We have already determined that the enhancement study did not constitute substantial evidence supporting the assessment ordinance. We hold that Sisters successfully carried its burden of production and persuasion by demonstrating that the assessment was arbitrary. *See Simpson v. Home Petroleum Corp.*, 770 F.2d 499, 503 (5th Cir.1985). We conclude that the trial court did not place

the burden of proof on the City. We overrule the City's first and second points of error.

THE TEXAS OPEN MEETINGS ACT AND ARTICLE 1105b

In its fourth, fifth, and sixth points of error, the City contends that the trial court erred in concluding that the City Council's closed-door executive session violated section 2(e) of article 6252-17 and section 9 of article 1105b of the Texas Revised Civil Statutes. *See* TEX.REV.CIV.STAT.ANN. arts. 6252-17, 1105b (Vernon Supp. 1993).

At oral argument, the City conceded that the issues raised in these points of error are not necessary to the disposition of this appeal because the trial court did not grant affirmative relief for violations of these statutes. Therefore, we need not address the City's fourth, fifth, and sixth points of error. *See* TEX.R.APP.P. 90(a).

TEXAS CONSTITUTION

In point of error nine, the city contends that the trial court erred in concluding that the City's paving assessment ordinance constituted a taking without just compensation under the Texas Constitution. TEX.CONST. art I, § 17.

Sisters, however, did not seek compensation for injuries suffered under the takings clause of the Texas Constitution nor did the trial court grant affirmative relief based on such a violation. A determination of whether the City's assessment ordinance, rendered null and void by the trial court, constituted a taking without just compensation in violation of the Texas Constitution is not

necessary to the disposition of this appeal. Accordingly, we do not address the City's ninth point of error. *See* TEX.R.APP.P. 90(a).

UNITED STATES CONSTITUTION

The City's next four points of error concern the trial court's conclusion that the City's action in levying an arbitrary special tax assessment against Sisters's property resulted in a taking, thereby violating Sisters's federal rights secured by the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

1. Parties' Contentions

The City urges that the requirements of article 1105b of the Texas Revised Civil Statutes, which include public hearings coupled with appellate review, satisfy the commands of the United States Constitution. The City asserts that the trial court represents an integral part of the special tax assessment process, which is designed to insure that an improper tax is not levied. Further, argues the City, article 1105b provides judicial review to protect against a "taking by governmental action" or a "deprivation of property without due process of law." Consequently, the property owner – successful at the trial court level – has not suffered a "taking" or "deprivation of property" that would constitute a constitutional injury compensable in a section 1983 cause of action.[2]

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[2] 42 U.S.C.A. § 1983 (West Supp. 1993). Further references to sections shall be to Title 42 of the United States Code, unless otherwise indicated.

According to Sisters, the trial court's role is to determine if the City provided its citizens with appropriate substantive and procedural due process. If the trial court finds that the City acted arbitrarily, the trial court not only has the authority to invalidate the assessment and resulting lien, but also has the authority to find a constitutional injury under the United States Constitution and award damages and attorney's fees pursuant to section 1983 and 1988 of the U.S.Code. *See Byrd*, 713 S.W.2d at 228.[3] Sisters further contends that a "taking" occurred the moment the City assessed a tax in an amount greater than special benefits and imposed a tax lien on its property.

2. Applicable Law

As an abstract principle of law, any individualized assessment imposed on a basis other than special benefits conferred or in an amount exceeding the special benefits constitutes a taking of private property without just compensation in violation of the United States Constitution. U.S. CONST. amends, V, XIV; *Norwood v. Baker*, 172 U.S. 269, 279, 19 S.Ct. 187, 190, 43 L.Ed. 443 (1898); *Haynes*, 659 S.W.2d at 641; *Blackbird*, 394 S.W.2d at 162.

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[3] In *Byrd*, appellants, claiming that a city is not a proper defendant in a section 1983 cause of action, did not contest the trial court's conclusion of law that the assessment liens amounted to an interference with title to property and constituted a taking without just compensation. The court of appeals held that a city is a proper section 1983 defendant and the trial court had the authority to award attorney's fees to appellees. 713 S.W.2d at 229.

However, a specialized assessment, not based on special benefits, does not *automatically* entitle a plaintiff-taxpayer to an award of damages and attorney's fees under a section 1983 cause of action, alleging a violation of the Fifth and Fourteenth Amendments. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 n. 13, 105 S.Ct. 3108, 3120 n. 13, 87 L.Ed.2d 126 (1985); *Federal Deposit Ins. Corp. v. City of New Iberia*, 921 F.2d 610, 615 (5th Cir.1991). Although a specialized assessment may be greater than the benefits conferred and thereby violate the Fifth and Fourteenth Amendments, the unconstitutional assessment may not constitute a compensable injury under section 1983.

To determine whether Sisters suffered a "taking without just compensation" or "deprivation of property without due process of law," we must determine whether a pre-assessment hearing coupled with judicial review applying the substantial evidence rule satisfies the due process requirements of the Fifth and Fourteenth Amendments. *See* U.S. CONST. amends. V, XIV.

A special tax assessment in excess of benefits conferred will not contravene the Fifth and Fourteenth Amendments, thereby creating a compensable injury under section 1983, unless (1) the assessment is collected, and (2) the assessment amounts to such an abuse as to be an outright confiscation of property or taking without just compensation. *See Williamson*, 473 U.S. at 194 n. 13, 105 S.Ct. at 3120 n. 13; *Federal Deposit Ins. Corp.*, 921 F.2d at 615 (citing *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 21 S.Ct. 625, 45 L.Ed. 879 (1901); *Wight v. Davidson*, 181 U.S. 371, 21 S.Ct. 616, 45 L.Ed. 900 (1901); *City of Detroit v. Parker*, 181 U.S. 399, 21 S.Ct. 624, 45 L.Ed. 917

(1901)). To begin our inquiry, we first consider the due process requirements of the Fifth and Fourteenth Amendments.

a. Fourteenth Amendment

A Fourteenth Amendment "takings" challenge to a special tax assessment occurs if the tax collected is so palpably punitive or arbitrary as to confer no benefit on the landowner or "force[s] a landowner to make an improvement that, while valuable to others, is useless to him." *See Federal Deposit Ins. Corp.*, 921 F.2d at 615 (citing *Furey v. City of Sacramento*, 780 F.2d 1448, 1454 (9th Cir. 1986)).

Because collection of a tax constitutes a deprivation of property, the government must also provide procedural safeguards against unlawful exactions to satisfy the commands of the Due Process Clause.[4] To satisfy due process requirements,

> the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a clear and certain remedy for any erroneous or

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[4] Due process generally requires three factors to be considered: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and (3) the government's interest, including the function involved and the fiscal and the administrative burdens that the additional or substantive procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S.Ct. 893, 903-904, 47 L.Ed.2d 18 (1976).

> unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.

McKesson v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 39, 110 S.Ct. 2238, 2250, 110 L.Ed.2d 17 (1990) (footnotes and citations omitted). "The fundamental requirement of due process is the opportunity to be heard *'at a meaningful time and in a meaningful manner.'* " *Mathews*, 424 U.S. at 333, 96 S.Ct. at 902 (emphasis added and citations omitted).

If a municipality offers a meaningful opportunity for taxpayers to withhold contested tax assessments and challenge their validity, no deprivation of property without due process of law has occurred. *See McKesson*, 496 U.S. at 39-40, 110 S.Ct. at 2251. If the plaintiff-taxpayer prevails in its prepayment challenge to the unconstitutional tax, no deprivation of property has occurred, and the Fourteenth Amendment has not been contravened. *Id.*

The availability of a predeprivation review constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause. *See McKesson*, 496 U.S. at 40 n. 21, 110 S.Ct. at 2251 n. 21 (1990). Federal due process principles may also be satisfied by a postdeprivation procedure that represents a clear and certain remedy for any erroneous, unlawful, or unconstitutional collection of tax moneys. *Id.; Atchison v. O'Connor*, 223 U.S. 280, 285, 32 S.Ct. 216, 217, 56 L.Ed. 436 (1912).

b. Fifth Amendment

The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S.

264, 297 n. 40, 101 S.Ct. 2352, 2371 n. 40, 69 L.Ed.2d 1 (1981). A governmental entity may take property so long as it provides an adequate process for obtaining compensation. *Id.* If a property owner utilizes this procedure and is denied just compensation, the property owner may assert a violation of the Fifth Amendment. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n. 21, 104 S.Ct. 2862, 2878 n. 21, 81 L.Ed.2d 815 (1984). If resort to that process yields just compensation, then the property owner has no claim against the government for a taking. *Id.*

A governmental entity's action is not complete in the sense of causing a constitutional injury until (1) a taking occurs, and (2) the governmental entity does not provide an adequate postdeprivation remedy for the property loss. *Hudson v. Palmer*, 468 U.S. 517, 532 n. 12, 104 S.Ct. 3194, 3203 n. 12, 82 L.Ed.2d 393 (1984). Although exhaustion of judicial or administrative review procedures is not required,[5] the nature of the constitutional right to just compensation requires that a property owner utilize the procedures for obtaining compensation or prove that such procedures are wholly inadequate to prevail on a section 1983 claim based on a takings clause violation. *Williamson*, 473 U.S. at 194 n. 13, 105 S.Ct. at 3120 n. 13.

3. Application of Law to Facts

In the present case, the trial court concluded that "an assessment against property and its owner for paving improvements in an amount greater than [the] benefit

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[5] *See Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982).

conferred violates the Fifth and Fourteenth Amendments of the United States Constitution and amounts to a taking of private property for public use without just compensation." The trial court further concluded that the assessment constituted a lien and cloud on the title of Sisters's property. The trial court reasoned that Sisters filed the present action to remove the cloud on its title; therefore, Sisters, as a prevailing party in a section 1983 action, was entitled to receive reasonable attorney's fees as provided by section 1988.

The trial court correctly concluded that the City's tax assessment ordinance was unconstitutional as a matter of law. The trial court erred, however, in reasoning that any unconstitutional tax assessment constitutes, as a matter of law, a taking without just compensation in violation of the Fifth and Fourteenth Amendments. A localized assessment, not based on substantial benefits, is per se unconstitutional when levied because a governmental entity has no authority to assess a special tax on any basis other than special benefits. *See Norwood*, 172 U.S. at 279, 19 S.Ct. at 190; *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960). An unconstitutional special assessment, however, does not *automatically* entitle a section 1983 plaintiff to damages and attorney's fees for violations of the Fifth and Fourteenth Amendments. *See Williamson*, 473 U.S. at 194 n. 13, 105 S.Ct. at 3120 n. 13; *Federal Deposit Ins. Corp.*, 921 F.2d at 615.

Sisters, after proving the unconstitutionality of the assessment ordinance, must establish that the process provided by article 1105b does not meet the due process requirements of the Fifth and Fourteenth Amendments to

prevail in its 1983 claim.[6] We, therefore, examine the constitutional sufficiency of the due process afforded by article 1105b.

The Texas Legislature, pursuant to article 1105b of the Texas Revised Civil Statutes, designed a system to insure that only constitutional special taxes are assessed and collected. Article 1105b provides several procedural safeguards. Section 9 of article 1105b specifically incorporates the constitutional mandate that special tax assessments be limited to the amount of benefit conferred on the property assessed. *See* TEX.REV.CIV.STAT.ANN. art. 1105b (Vernon Supp.1993). Section 9 requires that notice and opportunity for hearing be provided before any assessment is levied against the property and its owner. *Id.*

The legislature further required municipalities to defend their special tax assessments against claims of arbitrary or fraudulent actions in state court. Section 9 grants the property owner the right to withhold payment and contest the assessment in a state district court. *Id.*

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[6] A cognizable claim under 42 U.S.C. § 1983 arises where (1) the conduct complained of was committed by a person acting under color of state law, and (2) this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. 42 U.S.C.A. § 1983 (West Supp.1993). Sisters alleged the requisite elements for a section 1983 claim. No constitutional law doctrine precludes a property owner from filing, concurrently with its article 1105b appeals hearing, a suit to recover damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 436, 102 S.Ct. 2515, 2423, 73 L.Ed.2d 116 (1982); *Steffel v. Thompson*, 415 U.S. 452, 472-73, 94 S.Ct. 1209, 1222, 39 L.Ed.2d 505 (1974); *Thomas v. Allen*, 837 S.W.2d 631, 633 (Tex.1992) (per curiam).

The property owner is not required to first pay the special assessment, then seek relief in state court for the payment of an unlawful tax. On the contrary, the statute authorizes a prepayment challenge to the arbitrary or fraudulent assessment. *Id.*

Here, Sisters have not paid, and the City has not collected, any tax revenue levied against Sisters. Further, the City's tax lien, during the pendency of the plaintiff-taxpayer's appeal, is unenforceable. A section 1983 claim, therefore, is not necessary to suspend the collection of an unconstitutional special assessment.

The automatic right to judicial review prior to payment represents a clear and certain remedy for any arbitrary assessment not based on special benefits. *See McKesson,* 496 U.S. at 40, 110 S.Ct. at 2251. Predeprivation review constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the requirements of both the Fifth and Fourteenth Amendments. U.S. CONST. amends, V, XIV; *see McKesson,* 496 U.S. at 40; 110 S.Ct. at 2251; *Williamson,* 473 U.S. at 1945 n. 13, 105 S.Ct. at 3120 n. 13.

Because of the safeguards and due process created by article 1105b, arbitrary actions by a city do not automatically translate into a federal constitutional injury compensable under sections 1983 and 1988. In determining what process is "due" under the Fifth and Fourteenth Amendments, the trial court must consider the process the City Council provided Sisters as well as the judicial review provided under article 1105b. A plaintiff must show the inadequacy of state remedies to redress its

alleged loss; otherwise, the plaintiff's evidence is insufficient to show a lack of due process and a violation of section 1983. *See Myers v. Adams*, 728 S.W.2d 771, 772 (Tex.1987) (per curiam).

This is not to say that a plaintiff-taxpayer in an article 1105b appeals hearing cannot meet its burden to show a violation of its federal constitutional rights. Rather, the plaintiff-taxpayer, in a special tax assessment case, must establish that the pre-assessment hearings coupled with judicial review applying the substantial evidence rule is not adequate to preserve its right to just compensation and due process of law; therefore, a 1983 cause of action is necessary. *See McKesson*, 496 U.S. at 40 n. 21, 110 S.Ct. at 2251 n. 21; *Williamson*, 473 U.S. at 194 n. 13, 105 S.Ct. at 3120 n. 13; *Hodel*, 452 U.S. at 297, 101 S.Ct. at 2371; *Federal Deposit Ins. Corp.*, 921 F.2d at 615.

The date on which a taking or deprivation of property must be measured is the date on which governmental action " 'immediately and drastically diminishes the value of the [property owner's] interest.' " *See Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798, 103 S.Ct. 2706, 2711, 77 L.Ed.2d 180 (1983) (citing *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, 313-14, 70 S.Ct. 652, 656-57, 94 L.Ed. 865 (1950)). A statutory special tax lien, although unenforceable pending appellate review, may represent such a scenario. *See Mennonite*, 462 U.S. at 798, 103 S.Ct. at 2711.

In the present case, there is no record evidence, however, that the City's lien rendered Sisters's property wholly useless or caused a diminution in economic value. In its conclusions of law, the trial court did not find that

invalidation of the assessment and lien, unaccompanied by payment of damages, would not compensate Sisters for the economic loss suffered as a result of the lien's interference with Sisters's property. The trial court did not determine what injury, if any, was caused by the lien's interference with the property's title. Sisters did not seek compensation for the lien's interference beginning with the date the lien attached and ending on the date the lien became void and unenforceable. *See San Diego Gas & Elec. v. City of San Diego,* 450 U.S. 621, 657-58, 101 S.Ct. 1287, 1307, 67 L.Ed.2d 551, (1981) (Brennan, J., dissenting). Rather, Sisters sought only attorney's fees as a prevailing party in a section 1983 cause of action.

Sisters utilized the article 1105b process and prevailed. The City has not collected any tax revenue assessed against Sisters's property. The record does not establish that the lien's interference with the property's title immediately and drastically diminished the property's value, rendered the property wholly useless, or caused a diminution in economic value. *See Mennonite,* 462 U.S. at 798, 103 S.Ct. at 2711. Consequently, Sisters did not meet its burden to show an unconstitutional taking or a deprivation of property without due process of law in violation of the Fifth and Fourteenth Amendments. We, therefore, conclude that the trial court erred in finding a constitutional injury compensable under section 1983. We sustain the City's eighth and tenth points of error.

In points of error seven and eleven, the City contends that the trial court erred in finding federal constitutional violations because substantial evidence exists to support the assessment. We have already determined that the

record does not contain substantial evidence to reasonably sustain the City Council's finding that the street improvements would enhance the value of Sisters's property in a sum equal to the amount assessed. Accordingly, we overrule the City's seventh and eleventh points of error.

ATTORNEY'S FEES

In its twelfth point of error, the City complains that the trial court erred in awarding Sisters its attorney's fees. The City argues that Sisters is not entitled to recover attorney's fees under state law or under section 1988.

Under Texas law, attorney's fees are not recoverable unless authorized by statute or by contract. *See New Amsterdam Casualty Co. v. Texas Indus. Inc.*, 414 S.W.2d 914, 915 (Tex.1967). Attorney's fees are not recoverable under article 1105b, the statute that provided Sisters with the hearing and right to appeal. *See* TEX.REV.CIV.STAT.ANN. art. 1105b (Vernon Supp.1993).

Under section 1988, attorney's fees are available to a prevailing party in a section 1983 cause of action. *See Byrd*, 713 S.W.2d at 229. We have already determined, however, that the City's imposition of an assessment lien on Sisters's property did not constitute a taking of private property without just compensation or a deprivation of property without due process of law in violation of the United States Constitution. U.S. CONST. amends. V, XIV.

Because no federal constitutional violations occurred, there is no basis for the trial court's award of attorney's fees under section 1988(b). Accordingly, the trial court

abused its discretion in awarding Sisters attorney's fees. We sustain the City's twelfth point of error.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In its thirteenth point of error, the City claims that there is no evidence or insufficient evidence to support a majority of the trial court's findings of fact and conclusions of law. The City does not brief its thirteenth point of error separately. Instead, the City asserts that its contentions are sufficiently addressed in its other twelve points of error. In view of our disposition of the City's first twelve points of error, we need not address the City's thirteenth point of error. *See* TEX.R.APP.P 90(a).

Accordingly, we reverse the trial court's award of attorney's fees and render that Sisters take nothing on its claim for attorney's fees. We affirm the trial court's judgment in all other respects.

NO. 88-08122-G

SISTERS OF THE HOLY FAMILY OF NAZARETH, A TEXAS CORPORATION,	§	IN THE 134TH JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS
PLAINTIFF,	§	
VS.	§	
CITY OF GRAND PRAIRIE,	§	
DEFENDANT	§	(Filed Mar. 5, 1992)

STIPULATIONS FOR TRIAL

Come now, Plaintiff SISTERS OF THE HOLY FAMILY OF NAZARETH, A TEXAS CORPORATION, and Defendant, CITY OF GRAND PRAIRIE who together would respectfully show the Court as follows:

I.

THE FOLLOWING STIPULATIONS WERE MADE ON AUGUST 7, 1989:

1. Plaintiff owns property that abuts Northwest 19th Street in the City of Grand Prairie, Dallas County, Texas.

2. Defendant is a Municipal Corporation which operates by virtue of the laws of the State of Texas and has adopted a home rule charter pursuant to the Texas Constitution.

3. Plaintiff is a person owning or claiming an interest in property assessed by Defendant pursuant to Article 1105b V.A.C.S.

4. An assessment was levied against the property belonging to Plaintiff through the passage and enactment of Ordinance number 4362.

5. Defendant has or will levy and file liens against the property belonging to Plaintiff pursuant to such Ordinance.

6. This action is filed in part pursuant to Article 1105b Section 9 and constitutes an appeal from the action of Defendant and is filed within the time period prescribed by such section.

7. Plaintiff has been assessed $37,270.00 by Defendant, based on a dollar amount per front linear footage of its property abutting on Northwest 19th Street.

8. Plaintiff was assessed at the rate of $37.80 per front linear foot.

9. Other adjacent property owners were assessed different amounts or nothing at all.

10. The above assessment represents a portion of the costs of improving Northwest 19th Street in such City between IH30 and Carrier Parkway.

11. The governing body of Defendant determined that such assessment was reasonable and that the property owned by Plaintiff received or would receive special benefits through increased property value not common to the public at large as a result of the widening and improvement of Northwest 19th Street.

12. The governing body of Defendant further determined that such special benefits equaled the amount of the assessment.

13. The Defendant's governing body therefore determined that the Plaintiff's parcel of property had or would receive special benefits of $37.80 per front linear foot as a result of the improvement of Northwest 19th Street.

14. The special assessments against Plaintiff and its properties has been (or will be) levied against Plaintiff and its property and assessment liens have been or will be filed of record with the Dallas County Clerk's office against such properties.

15. The minutes for the briefing session for the June 7, 1988 council meeting accurately reflect the proceedings.

16. The minutes for the council meeting of June 7, 1988 accurately reflect the proceedings.

17. The minutes for the briefing session for the June 14, 1988 council meeting accurately reflect the proceedings.

18. The minutes for the council meeting of June 14, 1988 accurately reflect the proceedings.

19. On June 7, 1988, a hearing on the proposed assessments was held before Defendant's governing body.

20. Prior to the June 7, 1988 council meeting, each council member received a "Council Communication" regarding the proposed assessment.

21. This "Council Communication" contained the only written information pertaining to the assessment that was provided to each of the council members prior to the June 7, 1988 council meeting.

22. The Council Communication for the June 7, 1988 meeting contained an assessment roll which was prepared by the Public Works Department of Grand Prairie.

23. The Public Works Department used an enhancement study which was prepared by Evaluation Associates and dated April 10, 1987 to prepare its assessment roll.

24. The Public Works Department did not use any other appraisals or enhancement studies to prepare the "assessment roll".

25. The council relied upon the Public Works Department to provide a proper assessment roll.

26. Evaluation Associates used a "land only" basis for its enhancement study, without regard to the improvements on Plaintiffs (or anyone else's) property.

27. At the time of the assessment, the Plaintiff's property was used for religious purposes as a convent, retirement home, retreat center, chapel, and cemetery complex.

28. The matter was tabled on June 7, 1988. On June 14, 1988, the matter was again considered, and the action about which Plaintiff is complaining occurred.

29. The construction and improvement of Northwest 19th Street was made necessary due to the growth of Grand Prairie, and the tremendous increase in traffic volume, actual and potential, on Northwest 19th Street.

30. The governing body of Defendant met as a body in an executive closed-door session on June 14, 1988 in connection with the assessments.

31. The Council consulted with the city attorney during this executive session.

32. The Council did not consult with the city attorney during the open session on June 14, 1988 in regards to the proper assessments.

33. Subsequent to the executive session, Mayor Debo stated: " . . . after consultation with the City Attorney, the Council has found that the appraisals are reasonable and fair, and that they are acceptable and salient for the use of the land."

34. On June 14, 1988, subsequent to the closed executive session, a motion was made at a regular meeting of the Defendant's governing body to levy the assessments as per Ordinance 4362 and such motion was carried.

II.

THE FOLLOWING ADDITIONAL STIPULATIONS ARE BEING MADE AT THIS TIME:

35. The paving assessments constitute a statutory lien (interference) with Plaintiff's title to the property.

36. Such lien will continue until the City of Grand Prairie releases it, or until a final judgment by this Court is entered, decreeing that the lien of the City is invalid.

37. A reasonable attorney fee for the legal services of Charles J. Winikates would be $___ per hour.

38. A reasonable attorney fee for the legal services of David S. Curtis would be $150.00 per hour.

39. A reasonable attorney fee for the legal services of Charles J. Winikates, Jr. would be $100.00 per hour.

40. It was reasonable and necessary for Charles J. Winikates to spend 73.65 hours in representing the Plaintiff's interest in connection with this lawsuit from June, 1988 until March 4, 1992.

41. It was reasonable and necessary for David S. Curtis to spend 45.50 hours in representing the Plaintiff's interest in connection with this lawsuit from June, 1988 until March 4, 1992.

42. It was reasonable and necessary for Charles J. Winikates, Jr. to spend 307.63 hours in representing the Plaintiff's interest in connection with this lawsuit from June, 1988 until March 4, 1992.

43. It was reasonable and necessary for the law firm of Winikates & Curtis (Winikates & Winikates after December 1, 1991). to spend $4,171.07 for costs in representing the Plaintiff's interest in connection with this lawsuit from June, 1988 until March 4, 1992.

44. If this case is appealed, a reasonable fee for Winikates & Winikates to charge for the necessary legal work in representing the Sisters before the Court of Appeals would be $5,000.00.

45. If a petition for writ of error is filed with the Supreme Court, a reasonable fee for Winikates & Winikates to charge for the necessary legal work in representing the Sisters would be $3,000.00; and if the writ is granted, an additional fee of $2,000.00 would be reasonable and necessary.

46. Executive sessions of the City Council of Grand Prairie are always closed to the public.

The only people who attend are members of the Council, the City Attorney, and, occasionally, other individuals selected by the Council.

On November 6, 1991, the Court partially granted Plaintiff's Motion for Partial Summary Judgment, and found "there was not substantial evidence that the subject property received a special benefit equal to, or in excess of the amount of the assessment.

III.

CONTESTED ISSUES OF LAW:

1. The parties agree that if the Court was correct in finding "no substantial evidence," then the assessment was imposed contrary to State law (V.A.T.S Article 1105b).

2. Whether the assessment that was imposed by the city was based upon an arbitrary determination of benefits.

3. Whether, as a matter of law, the city's actions constituted a taking of private property without just compensation, contrary to the Fifth and Fourteenth Amendments to the U.S. Constitution.

4. Whether, as a matter of law, the executive sessions, which were closed to Plaintiff, and conducted during the June 7 and 14th, 1988 meetings of the Grand Prairie City Council meetings denied Plaintiff the right to a public hearing as provided for, and guaranteed by, Article 1105b, Section 9, V.A.C.S..

5. Whether, the closed executive sessions which were closed to Plaintiff, and conducted

during the June 7 and 14th, 1988 meetings, of the Grand Prairie City Council meetings, violated the Texas Open Meetings Law.

6. Whether the city's actions bring it within 42 U.S.C. sections 1981-1986.

7. Whether the city's actions constituted violations of the Sister's rights pursuant to Sections 1981-1987 of Title 42 of the United States Code.

8. Whether the Sisters should be awarded attorney's fees pursuant to Section 1988 of title 42 of the United States Code.

SIGNED, and RESPECTFULLY SUBMITTED this 5th day of March, 1992.

WINIKATES & WINIKATES
Stewart Title Building, Suite 200
5728 LBJ Freeway
Dallas, Texas 75240
214/386-0636
ATTORNEYS FOR THE SISTERS
OF THE HOLY FAMILY OF NAZARETH

BY: /s/ Charles J. Winikates, Jr.
CHARLES J. WINIKATES, JR.
Texas Bar No. 21771010

CITY OF GRAND PRAIRIE, TEXAS
Office of the City Attorney
P.O. Box 530011
GRAND PRAIRIE, TEXAS

BY: /s/ Thomas L. Allensworth
THOMAS L. ALLENSWORTH
ATTORNEY FOR DEFENDANT
Texas Bar No. 01077300

Approved this ___ day of March, 1992.

_____

Judge Presiding

ENDORSEMENT ON INSTRUMENT NO. 88-08122-G
Sisters of the Holy Family of Nazareth
vs.
City of Grand Prairie
STIPULATIONS FOR TRIAL
Filed: March 5, 1992

NO. 88-08122-G

SISTERS OF THE HOLY FAMILY OF NAZARETH, A TEXAS CORPORATION,	§	IN THE 134TH JUDICIAL DISTRICT COURT OF
PLAINTIFF,	§	DALLAS COUNTY,
VS.	§	TEXAS
CITY OF GRAND PRAIRIE,	§	(Filed April 21, 1992)
DEFENDANT	§	

ADDITIONAL STIPULATIONS FOR TRIAL

Come now, Plaintiff SISTERS OF THE HOLY FAMILY OF NAZARETH, A TEXAS CORPORATION, and Defendant, CITY OF GRAND PRAIRIE who together would respectfully show the Court as follows:

I.

THE FOLLOWING ADDITIONAL STIPULATIONS WERE MADE ON APRIL 20, 1992. They are to be read in conjunction with the STIPULATIONS FOR TRIAL which was filed with the Court on March 5, 1992, which are adopted and incorporated by reference herein:

47. The parties stipulate and agree that the City adopted three (3) ordinances concerning the paving assessment involved in this dispute, and that those three (3) ordinances are Grand Prairie Ordinance Numbers 4328, 4362, and 4620. True and correct copies of these ordinances are attached hereto.

48. The parties stipulate and agree that Plaintiff received proper notice, prior to the June 7th, 1988 meeting, of the City's intent to impose a paving assessment.

49. The parties stipulate and agree that there were two (2) hearings before the City Council of the City of Grand Prairie at which the paving assessment was discussed; the first hearing being on the 7th of June, 1988, during which the matter was tabled, and the second hearing being on the 14th day of June, 1988.

50. The parties stipulate and agree that the minutes of the May 3rd, June 7th, and June 14th, 1988 meetings of the Grand Prairie City Council (including the briefing session minutes for the same dates), are true and correct copies of the minutes as they appear in the Minute Book of the City of Grand Prairie. True and correct copies of these minutes are attached hereto.

51. The parties stipulate and agree that accompanying the City Council Communication referred to in stipulations 20 and 21, were ordinances relating to the paving assessment. The communication and ordinances contained the only written information pertaining to the assessment that was provided to each of the council members prior to each of the council meetings.

52. The parties stipulate and agree that an assessment roll, referred to in stipulation 22, was made a part of the relevant Grand Prairie Ordinances relating to the paving assessments.

53. A reasonable attorney fee for the legal services of Charles J. Winikates would be $200.00 per hour.

54. It was reasonable and necessary for Charles J. Winikates to spend 93.90 hours in representing the Plaintiff's interest in connection with this lawsuit from June, 1988 until April 19, 1992. This stipulation is in lieu of former stipulation number 40.

55. It was reasonable and necessary for Charles J. Winikates, Jr. to spend 341.63 hours in representing the Plaintiff's interest in connection with this lawsuit from June, 1988 until April 19, 1992. This stipulation is in lieu of former stipulation number 42.

56. The parties stipulate and agree that because the Plaintiff is a religious and charitable organization, the attorneys representing the Sisters of the Holy Family of Nazareth have been billing the Plaintiff for only one-half of the hourly rates which the parties have agreed are reasonable. The Plaintiff's attorneys will charge the Plaintiff the full fee that is awarded by the Court if it is in excess of the one half rate that the attorneys have been charging the Sisters. The Plaintiff has paid the full amount of Court costs in this case.

57. The parties stipulate and agree that the copies of the monthly paving assessment statements from the City, the letter from the Public Works Department of the City dated December 5, 1989, and the certified letter from Wright & Associates, dated June 15, 1990, all of which are attached hereto, are true and correct copies of documents that were sent to the Sisters of the Holy Family of Nazareth by the City of Grand Prairie, and received by the Sisters of the Holy Family of Nazareth.

58. The Court may award such additional attorney fee to Plaintiff for work done after April 19, 1992, as the

Court deems appropriate, without further stipulations or testimony.

59. Everything necessary to be done by the City for a statutory lien to attach has been done. This is in lieu of stipulations numbers 5 and 14.

SIGNED, and RESPECTFULLY SUBMITTED this 21st day of April, 1992.

WINIKATES & WINIKATES
Stewart Title Building, Suite 200
5728 LBJ Freeway
Dallas, Texas 75240
214/386-0636
ATTORNEYS FOR THE SISTERS
OF THE HOLY FAMILY
OF NAZARETH

BY: /s/ Charles J. Winikates, Jr.
CHARLES J. WINIKATES, JR.
Texas Bar No. 21771010

CITY OF GRAND PRAIRIE, TEXAS
Office of the City Attorney
P.O. Box 530011
GRAND PRAIRIE, TEXAS 75053-0011

BY: /s/ Thomas L. Allensworth
THOMAS L. ALLENSWORTH
ATTORNEY FOR DEFENDANT
Texas Bar No. 01077300

Approved this ___ day of April, 1992.

_____
Judge Presiding

NO. 88-08122-G

SISTERS OF THE HOLY FAMILY OF NAZARETH, A TEXAS CORPORATION,	§	IN THE 134TH JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS
PLAINTIFF,	§	(Filed May 22, 1992)
VS.	§	
CITY OF GRAND PRAIRIE,	§	
DEFENDANT	§	

PLAINTIFF'S ~~PROPOSED~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMES NOW, SISTERS OF THE HOLY FAMILY OF NAZARETH A TEXAS CORPORATION, and files this Plaintiff's Proposed Findings of Fact and Conclusions of Law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-captioned cause came on for trial before the Court without a jury on April 21, 1992.

The Plaintiff appeared in person and by and through its attorney's [sic] of record.

The Defendant appeared by and through its attorneys of record.

After considering the pleadings, the evidence, the argument and briefs from counsel, the Court, in response to a request from Defendant, makes its findings of fact and conclusions of law as follows:

1. There was not substantial evidence that the subject property received a special benefit equal to, or in excess of the amount assessed.

2. There is no admissible evidence of special benefits accruing to the subject property.

3. The Sisters received no special benefit as a result of the improvements to 19th street.

4. The assessment by the City of Grand Prairie amounted to an interference with the Sisters' title to the property, and constituted a taking without just compensation, contrary to the Fifth and Fourteenth Amendments of the U.S. Constitution.

5. The Sisters are entitled to receive $67,939.07 plus interest at the rate of ten (10) percent per annum until paid for as attorney fees.

6. If this case is appealed, the Sisters are entitled to an additional sum of $5,000.00 as attorney fees.

7. If a petition for writ of error is filed with the Texas Supreme Court, the Sisters are entitled to an additional sum of $3,000.00 as attorney fees.

8. If the Texas Supreme Court grants a Writ in this case, the Sisters are entitled to an additional sum of $2,000.00 as attorney fees.

9. Plaintiff owns property that abuts Northwest 19th Street in the City of Grand Prairie, Dallas County, Texas.

10. Defendant is a Municipal Corporation which operates by virtue of the laws of the State of Texas and

has adopted a home rule charter pursuant to the Texas Constitution.

11. Plaintiff is a person owning or claiming an interest in property assessed by Defendant pursuant to Article 1105b V.A.C.S.

12. An assessment was levied against the property belonging to Plaintiff through the passage and enactment of Ordinance number 4362.

13. Everything necessary to be done by the City for a statutory lien to attach has been done.

14. This action is filed in part pursuant to Article 1105b Section 9 and constitutes an appeal from, and a review of, an action of Defendant and is filed within the time period prescribed by such section.

15. Prior to filing this lawsuit, the Sisters of the Holy Family of Nazareth had exhausted their remedies at the City Council level.

16. Plaintiff has been assessed $37,270.00 by Defendant, based on a dollar amount per front linear footage of its property fronting on Northwest 19th Street.

17. Plaintiff was assessed at the rate of $37.80 per front linear foot.

18. Other adjacent property owners were assessed different amounts or nothing at all.

19. The above assessment represents a portion of the cost of improving Northwest 19th Street in Grand Prairie between IH30 and Carrier Parkway.

20. The governing body of Defendant determined that such assessment was reasonable and that the property owned by Plaintiff received or would receive special benefits through increased property value not common to the public at large as a result of the widening and improvement of Northwest 19th Street.

21. The governing body of Defendant further determined that such special benefits equaled the amount of the assessment.

22. The Defendant's governing body therefore determined that the Plaintiff's parcel of property had or would receive special benefits of $37.80 per front linear foot as a result of the improvement of Northwest 19th Street.

23. The minutes for the briefing session for the June 7, 1988 council meeting accurately reflect the proceedings.

24. The minutes for the council meeting of June 7, 1988 accurately reflect the proceedings.

25. The minutes for the briefing session for the June 14, 1988 council meeting accurately reflect the proceedings.

26. The minutes for the council meeting of June 14, 1988 accurately reflect the proceedings.

27. There were two (2) hearings before the City Council of the City of Grand Prairie at which the paving assessment was discussed; the first hearing being on the 7th of June, 1988, during which the matter was

tabled, and the second hearing being on the 14th day of June, 1988.

28. Prior to the June 7, 1988 council meeting, each council member received a "Council communication" (with ordinances relating to the paving assessments attached) regarding the proposed assessment.

29. This "Council Communication" (with ordinances relating to the paving assessments attached) contained the only written information pertaining to the assessment that was provided to each of the council members prior to the June 7, 1988 council meeting.

30. The Council Communication for the June 7, 1988 meeting contained an assessment roll which was prepared by the Public Works Department of Grand Prairie.

31. The Public Works Department used an enhancement study which was prepared by Evaluation Associates and dated April 10, 1987 to prepare its assessment roll.

32. The Public Works Department did not use any other appraisals or enhancement studies to prepare the "assessment roll".

33. The council relied upon the Public Works Department to provide a proper assessment roll.

34. Evaluation Associates used a "land only" basis for its enhancement study, without regard to the improvements on Plaintiff's (or anyone else's) property.

35. At the time of the assessment, the Plaintiff's property was used for religious purposes as a convent, retirement home, retreat center, chapel, and cemetery complex.

36. The matter was tabled on June 7, 1988. On June 14, 1988, the matter was again considered, and the action about which Plaintiff is complaining occurred.

37. The construction and improvement of Northwest 19th Street was made necessary due to the growth of Grand Prairie, and the tremendous increase in traffic volume, actual and potential, on Northwest 19th Street.

38. The governing body of Defendant met as a body in an executive closed-door session on June 14, 1988 in connection with the assessments.

39. The Council consulted with the city attorney during this executive session.

40. The Council did not consult with the city attorney during the open session on June 14, 1988 in regards to the proper assessments.

41. During the closed Executive session, the City Council asked the City Attorney if they could remove the property owned by the Sisters of the Holy Family of Nazareth from the assessment roll, and the City Attorney responded that, in his opinion, they could not.

42. Subsequent to the executive session, on June 14th 1988, Mayor Debo stated: " . . . after consultation with the City Attorney, the Council has found that

the appraisals are reasonable and fair, and that they are acceptable and salient for the use of the land."

43. Subsequent to the executive session, on June 14th, 1988, "Councilmember Galligan stated that the City Attorney has advised that legally the Council cannot change the assessment on any particular property."

44. The City Attorney's advice to the Council in the closed Executive session was erroneous because pursuant to V.A.T.S. Article 1105(b) Section 9, a City's governing body "shall have the power to correct any errors, inaccuracies, irregularities and invalididities [sic], and to supply any deficiencies [sic] and to determine the amounts of assessments and all other matters necessary . . . ."

45. On June 14, 1988, subsequent to the closed executive session, a motion was made at a regular meeting of the Defendant's governing body to levy the assessments as per Ordinance 4362 and such motion was carried.

46. Neither Plaintiff nor its property received special benefits as a result of the widening and improvement of Northwest 19th Street.

47. There is no evidence that Plaintiff's property had drainage problems along Northwest 19th Street prior to the widening of Northwest 19th Street.

48. There is no evidence that increased traffic on Northwest 19th Street will provide a special benefit to the Plaintiff's property.

49. There is no evidence that the widening of Northwest 19th Street will provide better access to Plaintiff's property from Northwest 19th Street.

50. The assessments were not made in compliance with Article 1105b, V.A.C.S.

51. The City Council did not consider substantial evidence that the Plaintiff's property would be enhanced by at least $37,200.00.

52. There is no substantial evidence that the improvement to Northwest 19th Street will create special benefits to the Plaintiff's property.

53. Evaluation Associates evaluated the Plaintiff's property as single family residential development property.

54. It is uncertain whether a different use of the Plaintiff's property is reasonably probable within the immediate future or a reasonable time.

55. There is not a wide market for the Plaintiff's property for its present uses.

CONCLUSIONS OF LAW

1. The closed executive session violated the Texas Open Meetings Law.

2. The closed executive session denied Plaintiff the rights to a public hearing as provided for, and guaranteed by Article 1105b, Section 9, V.A.C.S.

3. The city acted in an arbitrary, capricious and unreasonable manner in proposing the assessments.

4. The city acted in an arbitrary, capricious and unreasonable manner in enacting Ordinance No. 4362.

5. Special benefit is not merely a creature of statute. Both our State and Federal Constitutions limit assessments to the amount of benefit conferred.

6. An assessment against property and its owners for paving improvements in an amount greater than benefit conferred violates Section 17 of Article 1 of the Constitution of Texas and the Fifth and Fourteenth Amendments of the United States Constitution and amounts to a taking of private property for public use without just compensation.

7. The term "special benefit" connotes a benefit more localized than a general community benefit.

8. There is no presumption of special benefit which arises simply by virtue of the improvement of a city street.

9. There is a strong presumption in favor of the validity of a municipal ordinance and review of an ordinance by the Court is governed by the substantial evidence rule.

10. Substantial evidence need not be much evidence, but substantial evidence means more than a scintilla.

11. A Court is not bound to accept the city's evidence uncritically but it has the power to closely examine the evidence, however, taking evidence as a whole, the action of the city government should be affirmed unless reasonable minds could not have reached the same decision.

12. The amount of special assessment cannot be based on an arbitrary or unreasonable determination of special benefits.

13. There was no evidence presented to the Grand Prairie City Council as to special benefits accruing to Plaintiff or its property at the public hearing on June 7, 1988, or on June 14, 1988.

14. There was no evidence of special benefits accruing to Plaintiff or its property presented at the time of trial.

15. The levy of the special assessments by Defendant against Plaintiff and its property amounted to a taking of private property for public purposes without just compensation.

16. The levy of special assessments and the filing of liens against the Plaintiff and its property deprived Plaintiff of significant property interests without due process of law.

17. Plaintiff is entitled to reasonable attorney's fees unless special circumstances would render the award of fees unjust.

18. The award of attorney's fees is discretionary with the Court.

19. No evidence was presented that would show or establish that the award of attorney's fees would be unjust.

20. The attorney's fees which this Court awarded, and which are as set forth above, were both necessary and reasonable.

21. The city's actions constituted a violation of the fifth amendment to the U.S. Constitution.

22. The city's actions constituted a violation of the fourteenth amendment to the U.S. Constitution.

23. The city's actions violated Sections 1981-1987 of the United States Code.

24. It is appropriate to award Plaintiff attorneys fees pursuant to Section 1988 of title 42 of the United States Code.

SIGNED this 22nd day of May, 1992.

/s/ Anne Ashby Packer
JUDGE PRESIDING

Respectfully submitted
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ATTORNEYS FOR THE
SISTERS OF THE
HOLY FAMILY OF NAZARETH

BY: /s/ Charles J. Winikates, Jr.
CHARLES J. WINIKATES, JR.
Texas Bar No. 21771010

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 1992, a true and correct copy of the foregoing Plaintiff's Proposed Findings of Fact and Conclusions of Law is being sent by certified mail to the Defendant, City of Grand

Prairie, by and through its attorney of record, R. Clayton Hutchins, Esquire.

/s/ Charles J. Winikates, Jr.
CHARLES J. WINIKATES, JR.

ENDORSEMENT ON INSTRUMENT NO. 88-08122-G

Sisters of the Holy Family of Nazareth
vs.
City of Grand Prairie
PLAINTIFF'S FINDINGS OF FACT AND CONCLUSIONS OF LAW
Filed: May 22, 1992 BILL LONG, District Clerk

Dallas County, Texas /s/ _____ Deputy

Supreme Court, U.S.
FILED
SEP 6 1994
OFFICE OF THE CLERK

No. 94-238

In The

Supreme Court of the United States

October Term, 1994

SISTERS OF THE HOLY FAMILY OF NAZARETH,
A TEXAS CORPORATION,

Petitioner,

v.

CITY OF GRAND PRAIRIE, TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF GRAND PRAIRIE, TEXAS

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Whether this Court has jurisdiction under 28 U.S.C. § 1257 to issue a petition for writ of certiorari to the highest court of a state that refuses to exercise discretionary jurisdiction to review the judgment and opinion of an intermediate state appellate court?

Whether a taxpayer who successfully challenges a tax assessment ordinance under state law may recover attorneys' fees under 42 U.S.C. § 1988(b) absent proof of a federal constitutional violation?

LIST OF ALL PARTIES TO THE PROCEEDING

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No. 94-238

In The

Supreme Court of the United States

October Term, 1994

SISTERS OF THE HOLY FAMILY OF NAZARETH, A TEXAS CORPORATION,

Petitioner,

v.

CITY OF GRAND PRAIRIE, TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF GRAND PRAIRIE, TEXAS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent, the City of Grand Prairie, Texas (the "City" or "Respondent") respectfully requests that this Court deny the Petition for Writ of Certiorari to the Supreme Court of Texas (the "Petition") filed by the Sisters of the Holy Family of Nazareth ("Sisters" or "Petitioner").

Sisters' Petition should be denied because: (1) the Texas Supreme Court's May 11, 1994 order denying Sisters' application for writ of error is not a judgment

reviewable by this Court under 28 U.S.C. § 1257; (2) there is no conflict between the October 21, 1993 judgment of the Dallas Court of Appeals in this case and any decision of this Court or any other court; and (3) there is no issue of national importance involved in this case.

OPINIONS BELOW

In its original opinion and judgment, the Court of Appeals for the Fifth District of Texas at Dallas, Texas, affirmed the judgment of the 134th District Court of Dallas County, Texas, invalidating certain ordinances passed by the City assessing Sisters for benefits received from paving and drainage improvements and awarding Sisters $63,768.00 in attorneys' fees under 42 U.S.C. § 1988. *See City of Grand Prairie v. Sisters of the Holy Family of Nazareth*, No. 05-92-01962-CV, 1993 WL 290840 (Tex. App. – Dallas July 27, 1993, n.w.h.) (not designated for publication).

The City moved for rehearing, and on October 21, 1993, the court of appeals vacated its earlier judgment and issued a new judgment and opinion, which is reported at 868 S.W.2d 835 (Tex. App. – Dallas 1993, writ denied). On rehearing, the court of appeals concluded that Sisters – having successfully pursued a predeprivation remedy under state law – did not meet its burden to show an unconstitutional taking or deprivation of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Because Sisters did not show any violation of its federal constitutional rights, the court of appeals reversed the portion of the trial court's

judgment awarding Sisters attorneys' fees under 42 U.S.C. § 1988.

Sisters filed an application for writ of error seeking review by the Texas Supreme Court. On May 11, 1994, the Texas Supreme Court refused to exercise its discretionary jurisdiction and denied Sisters' application with the notation "writ denied."[1] Sisters now asks this Court to issue a writ of certiorari to the Supreme Court of Texas. *See* Petition for Writ of Certiorari ("Petition") at 1.

RESPONSE TO SISTERS' STATEMENT REGARDING JURISDICTION

Sisters asserts that this Court has jurisdiction to issue a petition for writ of certiorari to the Supreme Court of Texas under 28 U.S.C. § 1257, which provides for this Court's discretionary review of final judgments or decrees "rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a).

However, if a state supreme court refuses to exercise its discretionary jurisdiction to hear a case (as the Texas Supreme Court has done in this case), the judgment of the court of appeals (not the state supreme court's order refusing to hear the case) is the judgment reviewable under Section 1257. *See Interstate Circuit, Inc. v. City of Dallas*, 88 S.Ct. 1298, 1300 n.1 (1968) (noting that the

[1] The docket notation "writ denied" signifies that the Texas Supreme Court is of the opinion that the application presents no error of law which requires reversal or which is of such importance of the jurisprudence of the state as to require correction. *See* Tex. R. App. P. 133(a).

"Texas Supreme Court denied discretionary review and therefore the appeal is from the judgment of the [court of appeals]" under Section 1257); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 74 S.Ct. 396, 397 (1954) (Texas Supreme Court had "refused" petitioner's application for writ of error; thus, appeal was properly from the decision of the court of appeals, not the supreme court).[2] *See also American Ry. Express Co. v. Levee*, 44 S.Ct. 11, 12 (1923) (construing analogous discretionary review powers of Louisiana Supreme Court and holding that, when supreme court declined to exercise discretionary jurisdiction, the court of appeals was "the highest court of the State in which a decision could be had" within the meaning of Section 1257); Stern, Gressman and Shapiro, *Supreme Court Practice* (6th ed.) at § 3.16-.17 ("An order of a court of last resort declining to review a case is not ordinarily the judgment which is reviewable under § 1257; in that event, the reviewable judgment is that of the highest court possessing *and exercising* jurisdiction.") (emphasis added) (citations omitted).[3]

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[2] In *Calvert*, this Court construed the language in Section 1257 providing for an appeal from the *"highest court of a State in which a decision could be had"* in resolving the jurisdictional issue. *See* 74 S.Ct. at 397 (emphasis added). Although *Calvert* and *Interstate Circuit, Inc.* were decided before the 1988 amendments to Section 1257 eliminating the provisions for mandatory appeal to this Court, the emphasized language remains in the current version of Section 1257 providing for this Court's review of state court decisions by petition for writ of certiorari.

[3] To be distinguished are cases involving the highest court of a state's dismissal *of an appeal of right* in which the higher court's dismissal may be considered to be a decision on the merits of the case, or equivalent to an affirmance of the

Moreover, this Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. *See Coleman v. Thompson*, 111 S.Ct. 2546, 2553-54 (1991). As the Court stated in *Coleman*, the "independent and adequate state law ground" doctrine is jurisdictional. *Id.* at 2554. "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Id.* As discussed below, the judgment in this case is based upon state law grounds and does not warrant this Court's review.

Based upon these authorities and as required by Supreme Court Rule 15.4, the City objects to this Court's jurisdiction to grant a writ of certiorari to the Supreme Court of Texas as requested in Sisters' Petition.

STATUTES AND RULES INVOLVED

Portions of the relevant constitutional provisions, statutes, ordinances and regulations are set forth in Sisters' Petition. *See* Petition at 2-5. In the interest of brevity,

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appellate court's decision. *See, e.g., R.J. Reynolds Tobacco Co. v. Durham County*, 107 S.Ct. 499, 505-06 (1986); *Matthews v. Huwe*, 46 S.Ct. 108, 108-09 (1925). In contrast, in this case, the Texas Supreme Court's denial of Sisters' application for writ of error represents that Court's decision not to exercise its discretionary jurisdiction and does not in any way constitute an opinion on the merits of the case.

the City will not restate these provisions. Sup. Ct. Rule 24.2.

STATEMENT OF THE CASE

Although Sisters' statement of the case is generally correct, *see* Petition at 6-7, Sisters omits certain significant facts upon which the Dallas Court of Appeals relied in rendering its October 21, 1993 opinion and judgment. Accordingly, the City offers the following supplement to Sisters' statement of the case. Sup. Ct. R. 24.2.

Sisters fails to mention in its Petition the numerous procedural safeguards provided by article 1105b § 9 of the Texas Revised Civil Statutes ("article 1105b"). Specifically, article 1105b provides that the tax assessment is limited to the amount of benefit conferred on the property assessed; that notice and opportunity for a hearing be provided before any assessment is levied; and that a property owner has the right to withhold payment and contest the assessment in a state district court. The taxpayer is not, as Sisters suggests, relegated to seeking post-deprivation relief, nor is the taxpayer forced to pay the assessment under protest.

Indeed, it is undisputed that Sisters was never required to pay any amount of the assessment levied against it and that the lien imposed on its property has been removed as a result of its successful challenge to the assessment ordinance in Texas state court. Moreover, Sisters was not harmed by any lien because it had no intention of selling its property in the near future. Sisters has achieved all of the relief it sought through its pursuit of

state law proceedings. In this respect, Sisters is a "Petitioner" in name only – its attorneys are the only ones dissatisfied with the remedy provided by the Texas state courts.

REASONS FOR DENYING THE WRIT

The court of appeals' opinion in this case is completely consistent with this Court's holdings that predeprivation review, such as the procedure provided by article 1105b for judicial review prior to payment of the assessment, constitutes a procedural safeguard sufficient by itself to satisfy the requirements of both the Fifth and Fourteenth Amendments. *See McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S.Ct. 2238 (1990); *Williamson Co. Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195, 105 S.Ct. 3108, 3121 (1985). There is no conflict between the court of appeals' opinion in this case and any opinion of this Court or any other court.

Nor does this case involve any issues affecting federal law. Simply stated, this case is a dispute over attorneys' fees. Sisters successfully pursued its rights under state law, but article 1105b does not provide for an award of attorneys' fees. The Dallas court of appeals properly concluded that Sisters did not suffer a federal constitutional injury; accordingly, Sisters could not "prevail" on its claim under 42 U.S.C. § 1983 and therefore was not entitled to recover attorneys' fees under Section 1988(b). The decision in this case is based solely upon Texas law and Sisters' failure to meet its burden to show a federal

constitutional injury. This Court's exercise of jurisdiction is not warranted.

A. Sisters improperly relies upon cases that do not involve adequate *pre-deprivation* remedies.

As this Court has recognized, due process concerns are satisfied if a state provides a form of " 'predeprivation process,' for example by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and the interpose their objections as defenses in a tax enforcement proceeding initiated by the State," so long as the taxpayer is "given an opportunity for a hearing *before* he is deprived of any significant property interest." *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 2250 (1990) (emphasis in original). As the Dallas Court of Appeals properly concluded in this case, article 1105b meets all of this Court's requirements and satisfies the commands of the Due Process Clause.

Sisters' selective quotation from *McKesson* is misleading. Petition at 9. However, a careful review of the language quoted in Sisters' petition makes it clear that Sisters is not in the same position as the taxpayer in *McKesson*, who was required to pay taxes first and then obtain review of the tax's validity in a refund action. In contrast, under article 1105b, Sisters was allowed to – and did – withhold payment pending review of the validity of the assessment. Sisters did not suffer a taking of its property without due process of law.

Sisters' reliance upon *Albright v. Oliver*, 114 S.Ct. 807 (1994) and *Parratt v. Taylor*, 451 U.S. 527 (1981), Petition at 10-13, is similarly misplaced. *Albright*, in fact, did not even involve any alleged procedural due process violations, and this Court affirmed the lower court's ruling that the petitioner failed to show any federal constitutional violation to support his claim under Section 1983. *Albright*, 114 S.Ct. at 812-13. In *Parratt*, this Court held that the deprivation of property in that case did not violate the due process clause because it resulted from the unauthorized act of a state employee rather than an established state procedure. 451 U.S. at 539-43, 101 S.Ct. at 1915-16. The Court further noted in *Parratt* that state law provided an adequate remedy for the alleged loss. *Id.* at 543, 101 S.Ct. at 1915-16. In this case, there has been no federal constitutional violation, and Sisters has successfully prevailed on its remedy under state law.

B. Invalidity of the assessment ordinance does not automatically entitle Sisters to recover attorneys' fees.

The court of appeals properly concluded that the trial court's finding that the assessment ordinance was invalid does not automatically entitle Sisters to recover attorneys' fees based on its claim under 42 U.S.C. § 1983 ("Section 1983"). 868 S.W.2d at 843. The only question before this Court is whether such a finding – without more – supports an award of attorneys' fees under Section 1988.

Sisters argues that *City of Arlington v. Byrd*, 713 S.W.2d 224 (Tex. App. – Fort Worth 1986, writ ref'd n.r.e.), *cert. denied*, 482 U.S. 929 (1987) supports an award of

attorneys' fees in this case. Petition at 13-14. Although *Byrd* and this case both involve paving assessments by a municipality, the similarities between the two cases end at that point. Indeed, Sisters fails to acknowledge the crucial fact that makes *Byrd* inapplicable under the facts before this Court.

The court of appeals in *Byrd* did not hold that the City of Arlington's actions in that case constituted a violation of Section 1983. Petition at 13. Rather, the trial court in *Byrd* had filed a conclusion of law upholding the taxpayer's contention that the assessment liens filed by the City constituted a taking without just compensation. *Byrd*, 713 S.W.2d at 229. On appeal, the City of Arlington did not challenge this conclusion of law; rather, it challenged only the trial court's authority to include an award of attorneys' fees in the judgment. *Id.* at 228-29; *see also* 868 S.W.2d at 842 n.3 (noting that appellant in *Byrd* did not challenge trial court's conclusion of law regarding "taking").

Thus, given the unchallenged conclusion of law regarding a federal constitutional violation, the only issue before the court of appeals in *Byrd* was whether the trial court had the *authority* to award attorneys' fees under Section 1988 in an action challenging the validity of a special tax assessment. *Id.* The City does not dispute the trial court's *authority* to award attorneys' fees in a proper case. This, however, is not a proper case. The facts of this case and the record before this Court do not support an award of attorneys' fees because no federal constitutional violation occurred. *See City of Waco v. Hester*, 805 S.W.2d 807, 815 (Tex. App. – Waco 1990, writ denied) ("A necessary element in a § 1983 cause of action is proof of a

constitutional violation.") Moreover, the City *did challenge* – successfully – the trial court's erroneous finding on this point. 868 S.W.2d at 842-46. As a result, Sisters' reliance upon *Byrd* is misplaced.

C. Under the record in this case, Sisters has not shown its entitlement to attorneys' fees.

The court of appeals correctly explained in its opinion on rehearing that, in order for Sisters to prevail on its Section 1983 claim, it was required to show that the procedures provided by Tex. Rev. Civ. Stat. Ann. art. 1105b do not meet the due process requirements of the Fifth and Fourteenth Amendments. 868 S.W.2d at 842-43. The court properly determined that, under the facts of this case, Sisters' federal constitutional rights were not violated. 868 S.W.2d at 844-46.

Sisters improperly focuses on the pre-assessment hearing in arguing that it did not receive due process of law. Petition at 15-17. However, the constitutional analysis does not end at that point. When an alleged taking without just compensation has occurred, constitutional requirements are satisfied by a meaningful post-deprivation review. *Williamson County*, 473 U.S. at 195, 105 S.Ct. at 3121. As this Court stated:

> [B]ecause the Constitution does not require pre-taking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the [government action] is not "complete" until the [governmental entity] fails to provide adequate compensation for the taking.

Id. at 195, 105 S.Ct. at 3121. In this case, Sisters had – and successfully pursued – an adequate remedy in state court. *See* Tex. Rev. Civ. Stat. Ann. art. 1105b; 868 S.W.2d at 844-46. Thus, Sisters' complaints regarding the pre-assessment hearings do not end the inquiry.

In thoroughly considering the constitutional sufficiency of the process afforded by article 1105b, the court of appeals noted that article 1105b has several procedural safeguards. 868 S.W.2d at 845. Specifically, section 9 of article 1105b incorporates the constitutional mandate that special tax assessments must be limited to the amount of benefit conferred on the property assessed, requires notice and opportunity for hearing before any assessment is levied, and gives the property owner the right to withhold payment and contest the assessment in state court. The prepayment challenge and right to judicial review are in themselves sufficient to satisfy the Fifth and Fourteenth Amendments. 868 S.W.2d at 845.

Because of the safeguards under article 1105b, any alleged arbitrary assessment by the City does not automatically constitute a federal constitutional injury. 868 S.W.2d at 843. In order to show a violation of its federal constitutional rights, Sisters was required to show that the remedies under article 1105b (the pre-assessment hearings coupled with judicial review applying the substantial evidence rule) did not adequately preserve its right to just compensation and due process of law, thereby making necessary an action under Section 1983. Sisters failed to meet this burden.

Further, Sisters unsuccessfully attempts to distinguish the cases relied upon by the court of appeals in its opinion on rehearing. Petition at 17-19. First, Sisters incorrectly contends that *Williamson County* and *Federal Deposit Ins. Corp. v. City of New Iberia*, 921 F.2d 610 (5th Cir. 1991), do not support the court of appeals' holding that an unconstitutional special assessment does not automatically entitle a plaintiff to recover attorneys' fees under Section 1983. Petition at 17-19 (discussing *Williamson County* and *City of New Iberia*, 921 F.2d at 615). Sisters misses the point in focusing on the "ripeness" issue in *Williamson County*. Petition at 17-18.

As this Court explained in *Williamson County*, there can be no federal constitutional violation (and thus no claim under Section 1983) unless and until: (1) there is a "taking"; and (2) just compensation for that taking has been denied. *Williamson County*, 473 U.S. at 194-95, 105 S.Ct. at 3120-21. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id.* at 194, 105 S.Ct. at 3120. Thus, a "taking" does not in and of itself violate the Fifth Amendment. *Id.* at 194 n.13; 105 S.Ct. at 3120 n.13. Likewise, the finding of an unconstitutional tax assessment, standing alone, does not automatically constitute an injury within the Fifth or Fourteenth Amendment. The first inquiry is whether the process provided under state law (here, the procedural safeguards afforded under article 1105b) is sufficient to satisfy due process concerns. The court of appeals properly concluded that the procedures under article 1105b are constitutionally sufficient.

Sisters' discussion of *City of New Iberia* relates only to whether the assessment ordinance was valid, an issue the court of appeals determined in Sisters' favor in its original opinion and on rehearing. Petition at 18-19; 868 S.W.2d at 840-41. In any event, the Fifth Circuit's recognition in *City of New Iberia* that "local tax assessments [do] not contravene the Fourteenth Amendment unless they amount[ ] to such an abuse to be an outright confiscation of property" does support the court of appeals' conclusion that Sisters is not entitled to recover attorneys' fees simply because the ordinance was found to be invalid. *City of New Iberia*, 921 F.2d at 615 (citations omitted). A specialized assessment later declared invalid through proceedings under article 1105b does not automatically constitute a violation of the Fifth or Fourteenth Amendment to support recovery of attorneys' fees under Section 1988, and Sisters' arguments to the contrary are without merit.

The court of appeals also rejected as meritless Sisters' argument that the imposition of the lien caused a diminution of economic value equal to the amount of the lien. Petition at 19-20; 868 S.W.2d at 846. Although a tax assessment that "immediately and drastically diminishes the value of the [property owner's] interest" may constitute a "taking," the record in this case contains no evidence that the City's lien rendered Sisters' property useless or caused a diminution in economic value. 868 S.W.2d at 846, citing *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 103 S.Ct. 2706, 2711 (1983). Indeed, Sisters took advantage of the judicial review procedures in article 1105b and prevailed.

D. Because no federal constitutional violation occurred, there is no basis for an award of attorneys' fees.

The City does not dispute that "[section 1983] is not limited to suits for monetary damages." Petition at 21. However, as the court of appeals correctly noted, Sisters did not seek compensation for the lien's interference. Rather, it only sought attorneys' fees as a "prevailing party" under Section 1983. 868 S.W.2d at 846-47. A party is *not* a prevailing party under Section 1988 if he recovers only on state law claims. *See City of Waco v. Hester*, 805 S.W.2d 807, 817 (Tex. App. – Waco 1990, writ denied) (plaintiff did not prevail on § 1983 claim; judgment reformed to delete recovery of attorneys' fees). *See also Kelly v. City of Leesville*, 897 F.2d 172, 177 (5th Cir. 1990); *McDonald v. Doe*, 748 F.2d 1055, 1057 (5th Cir. 1984) (party must prevail on constitutional claims to recover under Section 1988).

Sisters cites *City of Riverside v. Rivera*, 477 U.S. 561 (1986), in support of its argument that it is entitled to recover attorneys' fees. Petition at 23. In *Rivera*, however, the plaintiffs *had prevailed* in their civil rights action. Consequently, the issue before this Court in *Rivera* was the reasonableness of the attorneys' fee award under Section 1988. In contrast, the question in this case is whether a party who prevails only on a *state law claim* can nevertheless recover attorneys' fees under the federal civil rights statutes. As the authorities cited above hold, and as the court of appeals properly held, attorneys' fees are not recoverable under the facts of this case.

Sisters did not meet its burden to show an unconstitutional taking or deprivation of property without due process of law and, therefore, is not a "prevailing party" under Section 1983. As a result, Sisters is not entitled to recover attorneys' fees under Section 1988(b).

Sisters' argument fails for another independent reason. Section 1988 only authorizes courts to award attorneys' fees "as part of the costs." 42 U.S.C. § 1988. As a result, "when a court denies costs, it must deny fees as well; if there are no costs, there is nothing for the fees to be awarded 'as part of.' " *See Farrar v. Hobby*, 113 S.Ct. 566, 577 (1992) (O'Connor, J., concurring). The judgment in this case orders that each party bear its own costs of the appeal. Thus, even if Sisters has otherwise shown its entitlement to attorneys' fees, Sisters did not recover any "costs" that attorneys' fees could be awarded "as part of."

CONCLUSION

Sisters incorrectly asks this Court to issue a writ of certiorari to the Supreme Court of Texas, and 28 U.S.C. § 1257 does not provide a jurisdictional basis for Sisters' request. Even if Sisters had requested issuance of a writ of certiorari to the proper court – the Dallas Court of Appeals, which rendered the judgment Sisters complains of – Sisters' Petition for a Writ of Certiorari should be denied because the court of appeals' opinion and judgment does not conflict with any decision of this Court or any other court. Moreover, Sisters' Petition presents no issue of national importance. The ordinance at issue has

been declared invalid by the state courts of Texas and the tax lien removed. Nevertheless, Sisters' attorneys attempt to invoke this Court's jurisdiction for their own benefit, even though attorneys' fees are not recoverable under article 1105b, and no federal constitutional violations occurred to support an award of attorneys' fees under 42 U.S.C. § 1988(b).

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 94-238

In The

Supreme Court of the United States

October Term, 1994

SISTERS OF THE HOLY FAMILY OF NAZARETH, A TEXAS CORPORATION,

Petitioner,

-against-

CITY OF GRAND PRAIRIE,

Respondent.

On Petition For A Writ Of Certiorari
To
The Supreme Court Of Texas

PETITIONER'S REPLY AND MOTION TO DIRECT PETITION TO THE COURT OF APPEALS, FIFTH DISTRICT OF TEXAS AT DALLAS

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The Supreme Court Of Texas

PETITIONER'S REPLY AND MOTION TO DIRECT PETITION TO THE COURT OF APPEALS, FIFTH DISTRICT OF TEXAS AT DALLAS

Petitioner herein respectfully responds to the BRIEF IN OPPOSITION FOR RESPONDENT CITY OF GRAND PRAIRIE, TEXAS, and, if appropriate, moves this Court to direct the Petition for Writ of Certiorari to the Court of Appeals, Fifth District of Texas at Dallas.

JURISDICTION

If it would be more appropriate to bypass the Supreme Court of Texas, and direct this Petition for Writ

of Certiorari to the Court of Appeals, Fifth District of Texas at Dallas, this can be done from the information that is contained in the Petition for writ of certiorari. In fact, the Conclusion And Prayer For Relief in the Petition for writ of certiorari "respectfully pray[ed] that this Court: grant this application for writ of certiorari, *reverse the holding of the Appellate Court* insofar as it does not allow Petitioner to recover its attorney's fees . . . " (emphasis added.)

Under 28 U.S.C. § 1651, the Supreme Court has the authority to issue any writ that may be necessary.

Under 28 U.S.C. § 1653, the Supreme Court has the authority to permit an amendment to the Petition for writ of certiorari to show that it has jurisdiction; "[E]very Court of Appeals that has considered the scope of § 1653 has held that it allows appellate courts to remedy inadequate jurisdictional allegations, but not defective jurisdictional facts." *Newman-Green, Inc. v. Alfonzo-Larrain,* 490 U.S. 826, at 832 (1989).

If this Court is of the opinion that Petitioner should ask that the petition for writ of certiorari be directed to the Court of Appeals, Fifth District of Texas at Dallas, Petitioner moves the Court to redirect the writ.

REASONS FOR GRANTING THE WRIT

Petitioner adopts the same arguments and reasons which it set forth in its Petition for writ of certiorari.

Although the Respondent would have this Court believe that, "under article 1105b, Sisters was allowed to

– and did – withhold payment pending review of the validity of the assessment" (Brief in Opposition for Respondent City of Grand Prairie, Texas, at 8), the undisputed facts show that during the entire "review" period (almost four years of vigorous litigation), the City:

1. Maintained an illegal, and unconstitutional, lien on the property;

2. Sent monthly statements, requesting payment of past due amounts, as well as interest; and,

3. Hired a law firm to send a demand letter, by certified mail, threatening a foreclosure suit, and suggesting that the Landowner remit payment immediately to the City of Grand Prairie.

Even though the City never collected money from Petitioner for the illegal assessment, the City stipulated that its lein interfered with Petitioner's title to the property. (Stipulation #35 – Petition for Writ of Certiorari, at App. 33.) Due process requires that the City of Grand Prairie provide some type of just compensation for the imposition, and maintenance, of the illegal lien. The City has not done so. As a religious institution, Petitioner only sought to recover (as just compensation) the reasonable attorney's fees, and costs, incurred in restoring clear title to its property. The trial court's Judgment should be upheld.

CONCLUSION AND PRAYER FOR RELIEF

Petitioner, Sisters of the Holy Family of Nazareth, a Texas Corporation, respectfully prays that this Court grant Petitioner the right to direct its petition for writ of certiorari to the Court of Appeals for the Fifth District of

Texas, at Dallas, if that be the appropriate Court to which the writ should be directed; that this Court grant the application for writ of certiorari, reverse the holding of the Appellate Court insofar as it does not allow Petitioner to recover its attorney's fees, affirm the decision of the trial court below, remand the case so that the trial court may award additional attorney's fees for presenting this case to this Court, and grant such other and further relief to which Petitioner may be entitled.

Respectfully submitted,

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